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## Religious Freedom and Laicite: A Comparison of the United States and France

TJeremy Gunn

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## Religious Freedom and *Laïcité*: A Comparison of the United States and France

*T. Jeremy Gunn*<sup>1</sup>

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All translations from French originals are by the author, unless otherwise noted.

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### I. INTRODUCTION

The word *laïcité* is used in France to summarize prevailing beliefs regarding the proper relationship between religion and the French state.<sup>2</sup> A term that plays a similar role in the United States, albeit

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2. *Laïcité*, which is often translated into English as “secular,” is a term that is difficult to define and almost impossible to translate. “There is no firm definition of *laïcité*: neither officially established nor generally accepted.” EMILE POULAT, NOTRE LAÏCITÉ PUBLIQUE 116 (2003) [hereinafter NOTRE LAÏCITÉ]. For a brief, but highly informative discussion of some of the different usages of the term, see *id.* at 115–24. *Le Grand Robert* dictionary defines *laïcité* as a “political notion involving the separation of civil society and religious society, the State exercising no religious power and the churches (*Églises*) exercising no political power.” PAUL ROBERT, 5 LE GRAND ROBERT DE LA LANGUE FRANÇAISE 915 (2d ed. 1992). *Laïcité* certainly evokes the concepts of secularism and separation of religion and the state, but, like the term “democracy,” it can have widely different meanings and applications in both polemical debates and legal texts. *Laïcité* has had constitutional status in France since 1946: “France is a Republic that is indivisible, *laïc*, democratic, and social. France assures the equality before the law of all its citizens without any distinction based on origin, race, or religion. It respects all beliefs.” CONST. art. 2 (1958) (Fr.). *Laïc* first appeared as a constitutional term in 1946. CONST. art. 1 (1946) (Fr.).

Without attempting to provide a comprehensive definition, *laïcité* should be understood as a term that was coined during the first decade of the Third Republic (1870–1940) to identify a particular understanding of the proper relationship between church and state. The *Litttré* dictionary identifies the first published use of the term as occurring in 1871. 4 DICTIONNAIRE DE LA LANGUE FRANÇAISE 1392 (Émile Littré ed., 1967). The term first appeared in the *Litttré* supplement of 1877, but it was defined there only as something that has a *laïc* character. *Laïc* or *laïque*, are words originally used in medieval French to identify monastic orders whose members were *not* ordained to the clergy, thus corresponding to the English sense of “secular” or “lay” in their original English meanings. Thus, a “lay brother” is a monk who does not hold clerical office. As first used, therefore, *laïc* referred to those whose lives were inside the Catholic Church and devoted to the church—though they did not hold the priesthood.

During the French Revolution, before the term *laïcité* was invented, much of the French Left had developed strong anticlerical attitudes toward the Catholic clergy. The simmering anticlerical attitudes from the revolutionary period reemerged in full force among the dominant political class from 1879 and continued through much of the first decade of the twentieth century. Between 1879 and 1905, several important French laws that affected the relationship between church and state were enacted, and some, albeit in amended form,

with a very different meaning, is “religious freedom.” These two concepts, at first glance, would seem to suggest profoundly different attitudes regarding the proper relationship between religion and the state. Whereas *laïcité* might imply suspicion (or perhaps even hostility) toward religion, religious freedom suggests that the state wishes to embrace religion fully, possibly to the exclusion of agnosticism and atheism. Public opinion surveys would seem to support such a contrast between a relatively unreligious France and a very religious United States.<sup>3</sup>

Despite the significant differences in the meanings of *laïcité* and religious freedom, the two terms are often described in effusive

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continue in force in the twenty-first century. These laws, particularly those on education (1882 and 1886), association (1901), and separation of church and state (1905), are understood to be among the founding documents of *laïcité* and the modern French state. Though these laws were extremely controversial when enacted, they are now described in almost reverential terms. Because of the controversial origins of these laws and their association with the doctrine of *laïcité*, for many French citizens the word evokes anticlericalism, anti-Catholicism, and sometimes blatantly antireligious sentiments. As early as 1880, some began to assert that the word “*laïc*” was actually a synonym for “irreligious.” See MONA OZOUF, L’ÉCOLE, L’ÉGLISE ET LA RÉPUBLIQUE, 1871–1914 (1963). For others, the antireligious connotations are much less pronounced, and they might use the term solely to suggest the distinctively French approach to the separation of religion and state. Whereas “religious freedom” in the United States typically bears the nuance of freedom of religion *from* the state, in France *laïcité* often bears the connotation of the state protecting citizens from the *excesses* of religion. The etymological irony of the evolution of *laïc* from referring to those whose lives were completely devoted to the Church, to meaning (in at least one modern sense of it) “anti-Church,” has been noted. Claude Langlois, *Catholiques et laïcs*, in 3.3 LES LIEUX DE MEMOIRE 146 (Pierre Nora ed., 1992). Though only a pale reflection of the French evolution of *laïc*, the English “secular” has similarly evolved from referring exclusively to nonordained monks to also meaning “nonreligious.”

Hundreds of books and articles have been published in France on *laïcité*. Of the many important writers, professors Jean Baubérot and Emile Poulat are among the most widely cited. See, e.g., JEAN BAUBEROT, HISTOIRE DE LA LAÏCITE FRANÇAISE (2000); JEAN BAUBEROT, LA LAÏCITE, EVOLUTIONS ET ENJEUX (1996); EMILE POULAT, LIBERTÉ, LAÏCITE: LA GUERRE DES DEUX FRANCE ET LE PRINCIPE DE LA MODERNITE (1987); NOTRE LAÏCITE, *supra*. For short, though somewhat dated, works in English that explain the historical background, see JOHN McMANNERS, CHURCH AND STATE IN FRANCE, 1870–1914 (1972) [hereinafter CHURCH AND STATE]; JOHN McMANNERS, THE FRENCH REVOLUTION AND THE CHURCH (1969) [hereinafter FRENCH REVOLUTION]. For further discussion of the meaning of *laïcité*, see *infra* text accompanying notes 24–30.

3. According to the Pew Global Attitudes Project:

Americans and Europeans differ over foreign policy and other issues, but those disagreements pale in comparison with the transatlantic gulf over religion and morality. While 58% of Americans say that belief in God is a prerequisite to personal morality, just a third of Germans and even fewer Italians, British and French agree.

PEW GLOBAL ATTITUDES PROJECT, VIEWS OF A CHANGING WORLD 115 (2003), <http://people-press.org/reports/pdf/185.pdf> (last visited Apr. 21, 2004).

language as founding principles of the republics, as unifying principles that bring citizens together, and as exemplifications of the admirable characteristics that make the nations role models for the rest of the world. In both countries, the doctrines are described as being fully consistent with the constitutional norms of equality, neutrality, and tolerance. But despite the popular beliefs that *laïcité* and religious freedom are founding principles that unite the citizens of their respective countries, they actually operate in ways that are more akin to founding myths. If we probe their historical backgrounds, it becomes clear that neither doctrine originated as a unifying or founding principle. Rather, each emerged during periods of confrontation, of intolerance, and often of violence against those who held dissenting beliefs. Moreover, in current controversies involving religion and the state, where the doctrines are cited for the ostensible purpose of resolving conflicts, they continue to be applied in ways that divide citizens on the basis of their beliefs and that belittle those whose beliefs do not conform to popular preferences. Thus, the doctrines of *laïcité* and religious freedom are frequently employed not in the idealized way that the myths might imagine, but in the confrontational and polemical ways in which they originally developed.

Two contemporary controversies involving religious expression in public schools illustrate how the doctrines of *laïcité* and religious freedom are applied in both their mythic and confrontational manners. In March 2004, France adopted a new law prohibiting children in public schools from wearing clothing and insignia that “conspicuously manifest a religious affiliation.”<sup>4</sup> The law, which was designed to prohibit students from wearing Islamic headscarves, Jewish skullcaps, and large crosses, was sponsored by the ruling conservative party, the Union for a Popular Movement (UMP), and was endorsed by the opposing Socialist Party.<sup>5</sup> The law was approved by an overwhelming vote of 494 to 36 in the National Assembly, and by a comparably disproportionate vote of 276 to 20 in the Senate, and was strongly supported by popular opinion throughout France.<sup>6</sup>

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4. Law No. 2004-228 of Mar. 15, 2004, J.O., Mar. 17, 2004, at 5190 [hereinafter Law No. 2004-228].

5. See *infra* discussion accompanying notes 166–82.

6. According to a public opinion survey in late 2003, 72% of the French population supported a law that would ban *all* signs of religious and political adherence in public schools,

Two years earlier, on the opposite side of the Atlantic, a divided panel of the United States Court of Appeals for the Ninth Circuit ruled in *Newdow v. U.S. Congress* (“*Newdow I*”), that the words “under God” in the American Pledge of Allegiance (the “Pledge”) violated the Establishment Clause of the Constitution.<sup>7</sup> The decision provoked an immediate public outcry.<sup>8</sup> On June 26, 2003, within hours of the release of the *Newdow I* opinion, the Senate voted ninety-nine to zero to reaffirm the language of the Pledge.<sup>9</sup> The following day, the House of Representatives adopted a similar

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as against 23% who opposed it (with 5% undecided). Moreover, 56% of the population would support a similar ban being imposed on private religious schools as well. When broken down by political viewpoint, the Right supports the public school ban by a slightly higher percentage than the Left (79% to 71%), and their beliefs are also felt with greater intensity than are those of the political Left. *Le sondage BVA/Profession Politique/LCP-AN en tableaux de pourcentages*, LE BLEU, Nov. 18, 2003, <http://www.laic.info/Members/webmestre/Societe.2003-11-20.2408/view> (last visited Apr. 21, 2004). For an early and perceptive French analysis of the 2004 legislation, see ALAIN GARAY & EMMANUEL TAWIL, *Tumulte autour de la laïcité*, 7145 RECUEIL DALLOZ 225 (2004).

7. 292 F.3d 597, 612 (9th Cir. 2002) [hereinafter *Newdow I*]. The Ninth Circuit panel reversed the lower court and held, by a 2–1 decision, that the words “under God” in the Pledge of Allegiance, as well as the California requirement that teachers lead students in the Pledge, both violate the Establishment Clause. The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion . . . .” U.S. CONST. amend. I. This original panel decision, *Newdow I*, was subsequently revised and amended to eliminate the holding that the words “under God” in the federal statute are unconstitutional, and held only that the California statutory requirement for teachers to lead the Pledge remains unconstitutional. *Newdow v. U.S. Congress*, 328 F.3d at 482–93 (9th Cir. 2003) [hereinafter *Newdow II*], cert. granted sub nom. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 384 (2003). The Ninth Circuit denied a rehearing en banc. *Id.* at 468–82 [hereinafter *Newdow III*]. (The amended decision and the opinions regarding the rehearing en banc were published together.) The Pledge of Allegiance is currently codified in the U.S. Code.

“I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all[ ],” should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

4 U.S.C. § 4 (2004).

The Pledge of Allegiance, without the expression “under God,” was first codified in federal law in 1942. 36 U.S.C. § 1972 (1942). The words “under God” were added in the Act of June 14, 1954, Pub. L. No. 396, ch. 297, 68 Stat. 249. See *infra* text accompanying notes 44, 87, 296–311.

8. See, e.g., Tom Vanden Brook, *Critics Say Court Was “California Dreaming,”* USA TODAY, June 27, 2002, at A04; Evelyn Nieves, *Judges Ban Pledge of Allegiance from Schools, Citing “Under God,”* N.Y. TIMES, June 26, 2002, at A20.

9. S. Res. 292, 107th Cong. (2003) (enacted).

resolution reaffirming the Pledge by a vote of 416 to 3.<sup>10</sup> Immediately after voting, one hundred members of Congress gathered to have their photographs taken on the front steps of the Capitol building while they held their hands over their hearts and recited the Pledge.<sup>11</sup> Apparently believing that the resolutions were insufficient, a few months later the Senate and House enacted a new federal statute “[t]o reaffirm the reference to one Nation under God in the Pledge of Allegiance.”<sup>12</sup> Showing no less patriotic zeal, the following sessions of the House and Senate adopted additional resolutions supporting the Pledge, again by lopsided majorities.<sup>13</sup> American public opinion surveys suggest Americans who were aware of the controversy were strongly opposed to the Ninth Circuit decision and firmly supported the continuation of the Pledge.<sup>14</sup>

The overwhelming legislative votes on religious clothing in France and the Pledge of Allegiance in the United States initially suggest a striking difference between the two countries. In France, schoolchildren are prohibited from engaging in religious expression in their choice of clothing, while in the United States, Congress has insisted that religious language designed to be recited in public schools throughout the country remain in the Pledge. Thus, France seems to prohibit religious expression while the United States promotes it. On the other hand, there are curious similarities in the two countries' approaches. In both cases the national legislatures relied on their respective doctrines of *laïcité* and religious freedom to decide that the state should be responsible for determining which forms of religious expression should (or should not) be permitted in public schools and imposed it in a way that not only corresponded to popular preferences, but showed contempt for those who believed that the legislative actions violated the constitutional values of

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10. H.R. Res. 459, 107th Cong. (2003) (enacted).

11. Whether knowingly or not, those gathering to have their pictures taken reciting the Pledge were copying the action of the original sponsors of the “under God” amendment in 1954, *see supra* note 7, who recited the Pledge while standing in front of CBS television cameras. *See infra* text accompanying note 311.

12. Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057 (amending 4 U.S.C. § 4 in order to “reaffirm[] the exact language that has appeared in the Pledge for decades”).

13. S. Res. 71, 108th Cong. (2003) (enacted); H.R. Res. 132, 108th Cong. (2003) (enacted).

14. FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2003, at 19 (2003), <http://www.firstamendmentcenter.org/PDF/SOFA.2003.pdf> (last visited Apr. 21, 2004).

equality and neutrality. France is suspicious of the true believer. The United States is suspicious of the non-believer.

But before considering their differences more fully, we should note some underlying similarities between the two countries. Among modern nations, France and the United States have two of the longest traditions of operating under written constitutions. The United States has the oldest such extant written Constitution in the world.<sup>15</sup> France's first constitution dates to 1791, long before most other European countries.<sup>16</sup> Their current constitutions incorporate the world's two oldest human rights texts, both written in 1789, that are in effect today: the French Declaration of the Rights of Man and Citizen and the American Bill of Rights.<sup>17</sup> Their common assumption—that human beings have inherent rights—has now been adopted (if not always respected) in almost all written constitutions in the world as well as in all of the basic international human rights instruments. French and Americans take pride in their human rights records and believe that they are models for the rest of the world.<sup>18</sup> The highest courts of both countries have held that their respective

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15. For the history of constitutions generally, see CONSTITUTIONS THAT MADE HISTORY (Albert P. Blaustein & Jay A. Sigler eds., 1988).

16. *Id.* at 70. The first modern constitution was that of the United States, followed by Poland (1791) and France (1791). Depending on how one defines "constitution," France may be said to have had more than a dozen constitutions since that of 1791. Its current constitution dates from 1958.

17. The documents were written within only a few weeks of each other in the latter part of 1789. While the French may claim chronological priority in both drafting and promulgating its declaration, Americans may claim greater continuity with the Bill of Rights. The American Bill of Rights was ratified effective December 15, 1791. The French Declaration of the Rights of Man, unlike the American Bill of Rights, has not been in continuous existence since it was drafted. It has, however, been incorporated by the preamble of the French Constitution of 1958. CONST. pmb. (1958) (Fr.). For further discussion of the Declaration, see *infra* note 213.

18. For example, President George W. Bush declared that "repressed people around the world must know this about the United States: . . . we will always be the world's leader in support of human rights." George W. Bush, Remarks by the President in Recognition of Cuba Independence Day (May 18, 2001), <http://www.whitehouse.gov/news/releases/2001/05/20010518-7.html> (last visited Mar. 10, 2004). He also takes personal credit for promoting human rights: "No President has ever done more for human rights than I have." Ken Auletta, *Fortress Bush*, THE NEW YORKER, Jan. 19, 2004, at 64 (quoting President George W. Bush) (internal quotes omitted).

In a widely publicized speech on *laïcité*, President Chirac made similar claims about France. "Everywhere in the world France is recognized as the country of human rights." Jaques Chirac, Speech from the Elysée Palace (Dec. 17, 2003) [hereinafter Chirac, Elysée Palace Speech], <http://www.elysee.fr/magazine/actualite/sommaire.php?doc=/documents/discours/2003/D031217.html> (last visited Mar. 11, 2004).

constitutions require state neutrality with regard to religion and non-religion and that equality is a governing norm on matters of religion and law.<sup>19</sup>

This Article will compare the French doctrine of *laïcité* and the American doctrine of religious freedom at three different levels, but without analyzing their constitutionality *per se*.<sup>20</sup> Part II will compare the rhetoric in which the two doctrines are commonly described. Part III compares the historical backgrounds in which the two doctrines emerged. Finally, the last two parts of the Article will examine how the doctrines have been applied to contemporary issues relating to religious expression in public schools. Part IV first examines the political and social events in France leading to the adoption of the religious clothing ban, followed by an analysis of a report issued by the presidentially appointed Stasi Commission, which made the recommendation that ultimately led to the adoption of the law.<sup>21</sup> Part V turns to the United States, where it first examines the historical background of the adoption of the Pledge of Allegiance, followed by an analysis of the dissenting opinions in the *Newdow* case, which argued that the phrase “under God” is constitutionally permissible. The opinions of the dissenting judges in *Newdow II* and *Newdow III* appear to conform to the attitudes of Congress and the American public, as seen through the mythic version of religious freedom.

Because founding myths can be deeply embedded in popular consciousness and political rhetoric, it may be difficult for the

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19. In the case of France, see Avis du Conseil d’État no. 346893 (Nov. 27, 1989), reprinted in BERNARD JEUFFROY & FRANÇOIS TRICARD, LIBERTE RELIGIEUSE ET REGIMES DES CULTES EN DROIT FRANÇAIS 1031–34 (1996). In the case of the United States, see, for example, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (holding that the Establishment Clause “forbids subtle departures from neutrality” (internal quotes omitted) (quoting Gillette v. United States, 401 U.S. 437, 452 (1971))); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 (1989) (religion clauses of the First Amendment “today . . . are recognized as guaranteeing religious liberty and equality” (citing Wallace v. Jaffree, 472 U.S. 38, 52 (1985))).

20. This Article does not attempt to make the argument that current constitutional law in France requires the French state to allow (within limits) children in public schools to wear religious attire, nor that the U.S. Constitution prohibits Congress from drafting a pledge for citizens that declares that America is a “Nation under God.” Although the author has opinions on these two issues, the purpose here is limited to showing that in the two countries the legal and constitutional issues often become entangled in the founding myths leading officials to see neutrality, equality, and unity where they are not present.

21. For further discussion of the Stasi Commission, see *infra* text accompanying note 177.

citizens of the two nations to recognize that their respective doctrines of *laïcité* and religious freedom actually operate as myths. However, it is not difficult for people who are not immersed in such myths to recognize their weaknesses. Americans would likely have no difficulty observing the flaws in the French approach that led to the banning of religious clothing,<sup>22</sup> just as the French would likely have no difficulty seeing problems in the American wish to have “under God” recited by children in schools.<sup>23</sup> We can imagine that the French and the Americans could easily recognize the actions on the opposite side of the Atlantic—the banning of religious clothing or the promoting of state-sponsored declarations about God—as *violating* the principles of equality, neutrality, tolerance, freedom of conscience, and human rights that their own nations scrupulously respect. Perhaps in seeing the similarities with each other—in rhetoric, history, and application—they will begin to recognize their own weaknesses.

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22. The French decision to ban headscarves in schools was widely reported in the American media in late 2003, and American officials and the media expressed their concern that prohibiting religious attire in public schools would infringe on rights of freedom of religion. See, e.g., E.J. Dionne, *In France, Scarves and Secularism*, WASH. POST, Dec. 23, 2003, at A21; John V. Hanford, III (Ambassador at Large for International Religious Freedom), Release of the 2003 Annual Report on International Religious Freedom (Dec. 18, 2003), at <http://usinfo.state.gov/dhr/Archive/2003/Dec/22-224652.html> (last visited April 20, 2004). An article in *Le Monde* suggested the possibility that American displeasure at the new Chirac proposal might lead to another round of tensions between the two countries on religious issues. Henri Tincq, *A Washington, la loi française sur le voile à l'école est une "source importante de préoccupation,"* LE MONDE, Dec. 20, 2003, LEXIS.

23. The coverage of the American Pledge controversy in the French media treated the American plaintiff as if he were a quixotic *ingénue* who was valiantly but futilely challenging the entire American politico-religious establishment. See, e.g., *L'Homme du jour: Michael Newdow*, L'HUMANITÉ, Jun. 29, 2002, <http://www.humanite.presse.fr/journal/2002-06-29/2002-06-29-36385> (last visited Mar. 11, 2004); “One Nation under God”: Le Serment d’allégeance examine par la Cour suprême—AFP, at [http://www.laic.info/Members/webmestre/La\\_laicite\\_dans\\_le\\_monde.2003-10-14.0231/view](http://www.laic.info/Members/webmestre/La_laicite_dans_le_monde.2003-10-14.0231/view) (last visited Mar. 11, 2003). Following Ambassador Hanford’s comments on headscarves in France, *supra* note 22, on headscarves in France, an unnamed French diplomat told the New York Times that “[v]ery often there are debates on the pledge of allegiance or other religious issues in the schools,” and then insisted, “Never have you heard a French diplomat comment on an internal debate in the United States.” Christopher Marquis, *U.S. Chides France on Effort to Bar Religious Garb in Schools*, N.Y. TIMES, Dec. 19, 2003, at A8.

## II. NATIONAL IDENTITIES AND FOUNDING MYTHS: *LAÏCITÉ* IN THE FRENCH REPUBLIC AND RELIGIOUS FREEDOM IN THE UNITED STATES

### *A. Laïcité as a Founding Myth of the French Republic*

Despite the lack of certainty about what *laïcité* actually means, officials, politicians, scholars, and citizens are often effusive in their praise of the term. A particularly impressive example of this appeared in a speech in December 2003 by President Jacques Chirac, where he first proposed that children be prevented from wearing “conspicuous” (*ostensible*) religious clothing in public schools.<sup>24</sup> The President asserted that “*laïcité* is inscribed in our traditions. It is at the heart of our republican identity.”<sup>25</sup> It is a principle to which citizens should be faithful: “It is in fidelity to the principle of *laïcité*, the cornerstone of the Republic, the bundle of our common values of respect, tolerance, and dialogue, to which I call all of the French to rally.”<sup>26</sup> *Laïcité* is a “pillar” of the French Constitution: “Its values are at the core of our uniqueness as a Nation. These values spread our voice far and wide in the world. These are the values that create France.”<sup>27</sup> It is a doctrine that protects the basic rights of belief: “*Laïcité* guarantees freedom of conscience. It protects the freedom to believe or not to believe. It assures everyone of the possibility to express and practice their faith peaceably, freely, though without threatening others with one’s own convictions or beliefs.”<sup>28</sup> France is a land of diversity in which *laïcité* promotes tolerance.<sup>29</sup> *Laïcité* is “one of the great accomplishments of the Republic. It is a crucial element of social peace and national cohesion. We can never permit it to weaken!”<sup>30</sup> Thus, *laïcité* is a foundational value, at the core of French uniqueness, and an inspiring model for the entire world.

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24. Chirac, Elysée Palace Speech, *supra* note 18.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. “As a land of ideas and principles, France is open, welcoming, and generous . . . . [The] French people are rich in their diversity. It is a diversity we have willingly accepted and which is at the heart of our identity.” *Id.* “We all speak of the values of tolerance and of respect for the other [and] of the diversity which has created the grandeur of France.” *Id.*

30. *Id.* In another speech, President Chirac said, “*Laïcité* is a value of extraordinary modernity that expresses the spirit of tolerance, of respect and of dialogue that must now,

President Chirac is not alone in using such words of praise. Prime Minister Jean-Pierre Raffarin observed that “*Laïcité* is a cardinal value that precisely permits each person to express his or her convictions in freedom, security, and tolerance. *Laïcité* is our common approach. *Laïcité* allows France to be a land of tolerance. *Laïcité* prevents France from pitting [religious and ethnic] communities against each other.”<sup>31</sup> In a speech to the Freemasons in 2003, the Minister of the Interior Nicolas Sarkozy (the French Interior Ministry is responsible for religious and police issues), asserted that “[*l*]aïcité is not a belief like others. It is our shared belief that allows others to live with respect for the public order and with respect for the convictions of everyone.”<sup>32</sup> It is not only politicians who hold such beliefs. Jean Gaeremynck, a *conseiller d’État* (counselor of state), praises it in words that might more appropriately be used to describe an expensive perfume rather than a legal doctrine: “the French style of *laïcité*, in its originality, its subtlety, its finesse, and richness . . .”<sup>33</sup> These descriptions of *laïcité* are words of homage, praise, admiration—perhaps even love.<sup>34</sup> They are the effusive but imprecise words that an amateur poet might use to describe his beloved. While he tells us that he adores her precious eyes, enchanting smile, and silky hair, the description is sufficiently vague that we would be unable to identify her in a crowd. This is the point of national myths and symbols: they are the receptacles that allow people to project onto them their idealized images of their values, cultures, histories, peoples, and lands.<sup>35</sup> In France one’s particular understanding of *laïcité* is tied to one’s sense of identity.<sup>36</sup>

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more than ever, prevail. It is a principle that we must not transgress . . .” *Jacques Chirac défend le principe de laïcité*, LE MONDE, May 5, 2003, LEXIS.

31. Jean-Pierre Raffarin, Speech to the CRIF (Jan. 25, 2003), <http://www.premier-ministre.gouv.fr/fr/p.cfm?ref=38100> (last visited Apr. 24, 2004).

32. Nicolas Sarkozy, Speech to the Freemasons (Jun. 24, 2003), [http://www.godf.org/discours\\_275\\_minint.pdf](http://www.godf.org/discours_275_minint.pdf) (last visited Mar. 10, 2004).

33. Jean Gaeremynck, *La Laïcité dans la loi*, 113-114 HOMMES ET LIBERTES, Mar.-Jun. 2001, at 33, 33.

34. Madeleine Rebérioux speaks of “the love the French have for the law [of 1905 on the separation of churches and the state].” Madeleine Rebérioux, *La Longue genèse de la laïcité*, 113-114 HOMMES ET LIBERTES, Mar.-Jun. 2001, at 26, 32.

35. Although words such as these are widely repeated and embraced in France, serious scholars and jurists fully understand that the encomiums to *laïcité* ultimately must be translated into legal principles. Mature French scholars and jurists, of course, have no difficulty differentiating between the myth of *laïcité* and the historical concept of *laïcité*. One thinks particularly of JACQUES ROBERT & JEAN DUFFAR, DROITS DE L'HOMME ET LIBERTÉS

*B. Religious Freedom as an American Founding Myth*

While Americans might be amused to hear the inherently vague doctrine of *laïcité* being described in such glowing tones, particularly when it is characterized as a cornerstone of the French Republic, they should perhaps first consider the rhetoric emanating from their own country. In terms of the constitutional language itself, the terms “free exercise of religion” and “establishment of religion” are not inherently more revealing than *laïcité*.<sup>37</sup> But this does not prevent officials from praising religious freedom in words similar to those used by the French to describe *laïcité*. In January 2002, for example, President George W. Bush said: “Religious freedom is a cornerstone of our Republic, a core principle of our Constitution, and a fundamental human right. Many of those who first settled in America, such as the Pilgrims, came for the freedom of worship and belief that this new land promised.”<sup>38</sup> Such effusive language comes from a president who emphasizes the role of religion in his own personal life. Before he was elected, the U.S. Congress had already enacted—unanimously—the International Religious Freedom Act of 1998. The introduction to that law states:

The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation’s founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom . . . .<sup>39</sup>

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FONDAMENTALES 564–67 (6th ed. 1996) (speaking of “a new *laïcité*” and “a renewed legal idea” and “a new *laic pact*”). The most impressive effort to date to analyze systematically French law on religion, both historically and jurisprudentially, is TRAITÉ DE DROIT FRANÇAIS DES RELIGIONS (Francis Messner et al. eds., 2003) [hereinafter MESSNER].

36. NOTRE LAÏCITE, *supra* note 2, at 21.

37. Religious freedom is a constitutional value in the United States, whose textual basis is located principally in the First Amendment to the Constitution, but emerges in other constitutional provisions as well, particularly in Article VI and the Fourteenth Amendment. For a detailed study describing the lack of any specific meaning of the term “establishment of religion” in eighteenth-century America, see T. JEREMY GUNN, A STANDARD FOR REPAIR: THE ESTABLISHMENT CLAUSE, EQUALITY, AND NATURAL RIGHTS 69–96 (1992).

38. George W. Bush, *President Proclaims Religious Freedom Day, 2002* (Jan. 16, 2002), <http://www.whitehouse.gov/news/releases/2002/01/20020116.html> (last visited Mar. 11, 2004).

39. 22 U.S.C. § 6401 (2004).

The U.S. State Department, in an explanation of why it seeks to promote religious freedom internationally, stated:

[T]he quest for religious liberty has played an integral part in American history. Early in our nation's founding, the view that every human being has a fundamental right to believe, worship and practice according to his or her own conscience became a core conviction of the American people. Religious liberty is the first of the enumerated rights in our Constitution, and is known as "the first freedom," because the founders believed it to be a lynchpin of democracy and the other fundamental human rights.<sup>40</sup>

The language that characterizes freedom of religion as "the first freedom" is made by those on both the political Right and the Left.<sup>41</sup> And the belief in America as a country founded on religious beliefs also has covered the political spectrum. One of the most liberal justices in the history of the Supreme Court, William O. Douglas, wrote famously that "[w]e are a religious people whose institutions presuppose a Supreme Being."<sup>42</sup> Former President George H.W. Bush, father of President George W. Bush, said when he was in office, "more than 90 percent [of Americans] believe in God, to which I say, thank God. I wish it were 100 percent."<sup>43</sup>

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40. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002: INTRODUCTION (2002) [hereinafter ANNUAL REPORT], <http://www.state.gov/g/drl/rls/irf/2002/13607.htm> (last visited Mar. 11, 2004).

41. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); NAT HENTOFF, THE FIRST FREEDOM (1980); JAMES E. WOOD, JR., THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS (1990). President George W. Bush proclaimed January 15, 2003, to be "religious freedom day," in honor of the anniversary of the adoption of the Virginia Statute of Religious Freedom. In his proclamation commemorating that event, he said that "[b]ecause the Framers placed the guarantee of religious freedom before other cherished rights, religious liberty in America is often called the first freedom." George W. Bush, *Religious Freedom Day, 2003* (Jan. 15, 2003), <http://www.whitehouse.gov/news/releases/2003/01/20030115-11.html> (last visited Mar. 11, 2004).

42. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

43. George Bush, Remarks at the Annual Convention of the National Religious Broadcasters (Jan. 27, 1992), <http://www.presidency.ucsb.edu/site/docs/pppus.php?admin=041&year=1992&id=012700> (last visited Mar. 11, 2004); see also George Bush, Remarks at a Prayer Breakfast in Houston (Aug. 20, 1992), <http://www.presidency.ucsb.edu/site/docs/pppus.php?admin=041&year=1992&id=082000> (last visited Mar. 1, 2004).

But anyway, as we meet today, deep in the heart of Texas, we meet deep in the heart of the most religious nation on Earth, too. I'm usually not much for polls, but here's a Gallup poll that makes sense to me. According to this survey, 7 in 10 Americans believe in life after death; 8 in 10, that God works miracles; 9 in 10 pray;

When Congress amended the Pledge of Allegiance in 1954 so that it would read “one Nation under God,” the Senate and House Reports made reference to the constant invocations to God throughout American history—by the Puritans, the founders, Lincoln, and others.<sup>44</sup> The House Report cited as precedents the Mayflower Compact of 1620, the Declaration of Independence, the Gettysburg Address, and the federal statute to place “In God We Trust” on coins.<sup>45</sup>

### III. CORRECTIONS OF ASSUMPTIONS UNDERLYING THE HISTORICAL ORIGINS OF *LAÏCITÉ* AND RELIGIOUS FREEDOM

The notions of religious freedom as a cornerstone of American history and as a value uniting and defining America are deeply felt and inspiring for most Americans—just as is *laïcité* in France. Although the rhetoric of *laïcité* and religious freedom is part of the self-congratulatory public discourse in both the United States and France, the underlying historical facts are not obscure.

#### *A. The Historical Roots of Laïcité*

The modern French conception of *laïcité* developed principally during two periods of French history: first, the five years following the Revolution of 1789, and second, the years 1879 to 1905 (during

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and more than 90 percent believe in God. To which I say, thank God for the United States of America. . . .

. . . [Y]ou cannot be President without believing in God. We say our prayers every night. When we sit in that historic family dining room on the second floor of the White House, we say the blessing before our meals. Today I ask for your prayers, not for the campaign that we're in but prayers asking God to give those of us in leadership positions and give me as President the strength to do what is right, the courage to lead this, the greatest nation on the face of the Earth, the United States of America, one Nation under God.

*Id.*

44. See H.R. REP. NO. 83-1693 (1954), reprinted in 1954 U.S.C.C.A.N 2339; S. REP. NO. 83-1287 (1954), reprinted in 100 CONG. REC. 6348.

45. See H.R. REP. NO. 83-1693, at 2340–41. This report inaccurately states that Congress enacted a law on April 22, 1864, “directing” the placement of “In God We Trust” on U.S. coins. The law simply gave the Director of the Mint the authority to specify the “shape, mottoes, and devices” of certain coins—nothing was said about “In God We Trust.” See An Act in Amendment of an Act entitled “An Act relating to Foreign Coins and the Coinage of Cents at the Mint of the United States,” 38th Cong., ch. 66 (1st Sess. 1864).

the Third Republic).<sup>46</sup> Without discussing these two periods in detail, it is useful to be reminded that, during these formative periods, *laïcité* did not embody the high principles of tolerance, neutrality, and equality; rather, it emerged from periods of conflict and hostility, most of which targeted the Roman Catholic Church.<sup>47</sup> The events described below were important steps in the formulation of the modern understanding of *laïcité*. It should be understood, however, that the circumstances and rationales underlying the actions and events were very complicated. Here they are offered not as criticisms of the Revolution or the Third Republic *per se*, but for the specific purpose of illustrating that *laïcité* did not arise as a unifying value shared by the French nation; rather, it grew out of periods that were filled with antagonism, conflict, and prejudice, as the following events illustrate.<sup>48</sup>

### *1. The first wave: the French Revolution*

On November 2, 1789, three months after the storming of the Bastille, the Constituent Assembly declared that Catholic Church property would henceforth be at the disposal of the nation.<sup>49</sup> During the following months, additional decrees and orders were issued that

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46. For the initial introduction to the term *laïcité*, see *supra* note 2. While these may be identified as the two *critical* periods, the modern notion of *laïcité*, of course, has roots in Gallicanism and the Enlightenment. It evolved between the Revolution and the Third Republic, and it has continued to change since that time. For more complete studies, see *supra* note 2.

47. Serious scholars, unlike the proponents of myths, have no difficulty recognizing that the modern understandings of *laïcité* emerged from conflict. See, e.g., NOTRE LAÏCITÉ, *supra* note 2, *passim*.

48. For studies of the revolutionary period, see A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 20–32, 449–56, 511–18 (François Furet & Mona Ozouf eds., Arthur Goldhammer trans., 1989); NIGEL ASTON, RELIGION AND REVOLUTION IN FRANCE, 1780–1804 (2000); WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION (1989); FRENCH REVOLUTION, *supra* note 2; FRANÇOIS FURET, REVOLUTIONARY FRANCE, 1770–1880 (Antonia Nevill trans., 1992); PATRICE HIGONNET, GOODNESS BEYOND VIRTUE: JACOBINS DURING THE FRENCH REVOLUTION (1998); LES CONGRÉGATIONS HORS LA LOI? (Jacqueline Lalouette & Jean-Pierre Machelon eds., 2002); SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION (1989); TIMOTHY TACKETT, RELIGION, REVOLUTION AND REGIONAL CULTURE IN EIGHTEENTH-CENTURY FRANCE: THE ECCLESIASTICAL OATH OF 1791 (1985); MICHEL VOVELLE, THE REVOLUTION AGAINST THE CHURCH (Alan José trans., 1991). For a brief legal discussion of the historical events, see MESSNER, *supra* note 35, at 87–89. The historical portions of the Messner book were under the responsibility of Professor Brigitte Basdevant-Gaudemet.

49. FRENCH REVOLUTION, *supra* note 2, at 27; SCHAMA, *supra* note 48, at 483–85.

led to the seizure and sale of a significant amount of former church property, in many cases enriching shrewd farmers, merchants, and nobles who were fortunate enough to obtain title to the lands and buildings.<sup>50</sup>

On February 13, 1790, the Constituent Assembly issued the Treilhard Decree, which dissolved all existing monastic vows, ordered those living under such vows to disperse, forbade any future religious vows, and dissolved all religious congregations with the proviso that they would never be able to reconstitute themselves.<sup>51</sup>

On July 12, 1790, the Constituent Assembly adopted the Civil Constitution of the Clergy.<sup>52</sup> As ultimately implemented, the Civil Constitution completely reorganized the internal structure of Catholic dioceses in France, dismissed almost fifty bishops, and appointed others without consulting the pope. It severed all relations with foreign religious institutions, which necessarily included the pope. In the future, members of the clergy were to be elected by popular vote. Church offices were reorganized and titles were eliminated or renamed to bring about uniformity. The new bishops were required to take an oath of loyalty to the state and their salaries were then to be paid by the state. In form, the oath was to be taken with the same straight-arm gesture that had been popularized earlier in the decade in imitation of the ancient Roman oath of loyalty.<sup>53</sup>

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50. At the time that church property was declared to be at the disposition of the nation, the law was not seen as particularly controversial.

51. 46 LE MONITEUR UNIVERSEL 184 (Feb. 15, 1790), *reprinted in* JEUFFROY & TRICARD, *supra* note 19, at 964 (citing only part of the decree); NOTRE LAÏCITÉ, *supra* note 2, at 51. Similar decrees were issued on September 3, 1791, August 4, 1792, and August 18, 1792. *Id.* One problem for historians of eighteenth- and nineteenth-century France is identifying and tracing the many laws, decrees, and edicts that purported to dissolve congregations. The frequency with which such edicts were issued says something important about the inability of officials to implement them fully and the ability of the congregations to operate despite adversity.

52. 194 LE MONITEUR UNIVERSEL 797–98 (July 13, 1790). For discussions of the Civil Constitution of the Clergy, see FRENCH REVOLUTION, *supra* note 2, at 38–67; NOTRE LAÏCITÉ, *supra* note 2, at 54–57.

53. The official salute for the oath during the Revolution was made with an outstretched straight-arm gesture, with the palm facing down. SCHAMA, *supra* note 48, at 174. This gesture, which was believed to have been the gesture used by the ancient Romans, was made famous in modern France by the painter Jacques-Louis David in his 1784 painting the *Oath of the Horatii*. The painting depicts the three Horatii brothers with outstretched arms swearing an oath of loyalty to the incipient Roman republic. In his study of the work, Professor Rosenblum was unable to find any classical sources for the Horatii having taken such an oath. ROBERT ROSENBLUM, TRANSFORMATIONS IN LATE EIGHTEENTH CENTURY ART 68–69 (1974). The painting's style and gesture created a sensation when it was first exhibited in Paris

From the time it began to be implemented, it could be said that there were two Catholic Churches, one that was “constitutional” and consisted of those who had pled allegiance to the state, and the other that was “resistant” or “non-juring” (*réfractaire*) and loyal to Rome.<sup>54</sup> Many (possibly most) historians of the period have judged it to be perhaps the single biggest mistake of the period, with some describing it in terms such as the beginning of a “holy war” or a “civil war,” as “destructive, indeed, disastrous,” and even as revealing an “instinct for intolerance.”<sup>55</sup>

On November 26, 1790, due to the refusal of many in the Catholic clergy to take the oath, the Constituent Assembly adopted a new law *requiring* all clergy to take an oath of loyalty to the state within one week, failing which they were to be replaced immediately.<sup>56</sup> Following the implementation of the law, and the issuance of orders and decrees, many of the resisting clergy either fled France (perhaps 30,000 to 40,000), were tracked down and

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in 1785. SCHAMA, *supra* note 48, at 172–74. Four years later, life imitated art. On June 20, 1789, when the Third Estate was barred from meeting in the Palace of Versailles, it moved to an indoor tennis court near the palace. There, in a moment of patriotic fervor, the Third Estate intentionally copied the straight-arm gesture depicted in the painting and swore, “to God and the *Patrie* never to be separated until we have formed a solid and equitable Constitution as our constituents have asked us to.” *Id.* at 359. Two years later, in September 1791, art imitated life imitating art when David exhibited at the biennial Salon in the Louvre his detailed drawing of the *Oath of the Tennis Court*, where he duly recorded the members holding their arms outstretched, just as he had conceived it in his *Horatii* painting. The 1791 drawing and the 1784 painting hung next to each other in the Salon. *Id.* at 568–69. One hundred years later, Americans adopted the straight-arm salute for the original Pledge of Allegiance—which perhaps makes this a case of life imitating art imitating life imitating art. For the American adoption of the straight-arm gesture for the first Pledge of Allegiance, see *infra* note 277.

54. NOTRE LAÏCITE, *supra* note 2, at 53.

55. SCHAMA, *supra* note 48, at 491. “If there was a point at which the Revolution ‘went wrong’, it was when the Constituent Assembly imposed the oath to the Civil Constitution of the Clergy. . . . This marked the end of national unity, and the beginning of the civil war.” For a discussion of “civil war,” see FRENCH REVOLUTION, *supra* note 2, at 38. The Civil Constitution “was especially destructive, indeed, disastrous. It brought out the Jacobins’ instinct of intolerance and saddled them with endless problems.” HIGONNET, *supra* note 48, at 26. “The Civil Constitution of the Clergy was the *patriotes*’ biggest mistake.” *Id.* In the judgment of François Furet, it would nevertheless be incorrect to see the enactment of the Civil Constitution by itself as an act of hostility toward the Catholic Church or religion. Rather, it was the taking of a step leading to devastating consequences that were not yet apparent in July 1790. FURET, *supra* note 48, at 83–84; NOTRE LAÏCITÉ, *supra* note 2, at 54 (stating that in a few months France passed from unanimity to a Manicheanism).

56. 332 LE MONITEUR UNIVERSEL 1372 (Nov. 28, 1790). William Doyle cited this law as the Constituent Assembly’s “most serious mistake.” See DOYLE, *supra* note 48, at 144.

imprisoned, or met in secret.<sup>57</sup> Though the pressure on the Catholic clergy was mounting, it should not be imagined that Catholics were only innocent victims who were being persecuted by an intolerant state:

Catholic France was stirring ahead of its priests, mobilized by intolerance and intrigue, alarmed by all the novelties regarding [civil rights for] Protestants and Jews, and annoyed that the Assembly should have refused to concede to the [Catholic] religion a “national” status which would have allowed it to retain a sort of privilege. The tradition of intolerance had resumed where it was strongest, in the towns of the Midi where Catholics and Protestants confronted one another. . . . [In Nîmes,] civil war raged for several days, to the great detriment of the Catholic forces, who were beaten and massacred.<sup>58</sup>

Prior to the beginning of 1791, many of the clergy had been supporters of the Revolution and had worked to find compromises. But the attempt to enforce the oath “turned a crisis into a disaster.”<sup>59</sup> A year after the first oath law was decreed, the new Legislative Assembly enacted a measure in November 1791 requiring all state functionaries, including the clergy, to affirm their oaths, the failure of which would make them “suspect” in the eyes of the law. “At the end of the summer [of 1791], the situation had hardened everywhere.”<sup>60</sup> A year later, on August 15, 1792, some of the ostensible principles of the French Revolution appeared in yet another oath that all state functionaries, including the clergy, were required to affirm: “I swear to be faithful to the nation, to maintain with all my power liberty [and] equality.”<sup>61</sup> The refusal to recite these words (which is, of course, different from the failure to live by them) led to an “open season for ‘priest hunts’ [where] the Assembly ordered nonjurors to quit the country within a fortnight on pains of

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57. FRENCH REVOLUTION, *supra* note 2, at 106.

58. FURET, *supra* note 48, at 90. One of the most insightful and informed historians of modern France, Theodore Zeldin, commented in another context how the Catholic Church—even after the turbulence of the Revolution—was fully capable of doing unto others what had been done to it. During Napoleon III’s rule, when the Church returned to a position of official approval in France, “it embarked on a policy of persecution of its enemies which destroyed most of the sympathy that liberals and republicans may have had for it.” THEODORE ZELDIN, FRANCE 1848–1945: ANXIETY AND HYPOCRISY 262 (1981).

59. ASTON, *supra* note 48, at 160.

60. FURET, *supra* note 48, at 90.

61. 230 LE MONITEUR UNIVERSEL 966 (Aug. 17, 1792); Aston, *supra* note 48, at 182.

deportation to Guiana.”<sup>62</sup> The irony of requiring this oath has been observed: “the paradoxical spectacle of an oath, a sacred gesture of national unity, had become a sign of the division of the nation.”<sup>63</sup>

On September 2, 1792, in response to news of a defeat of the French army on the Prussian front, Parisians reacted by storming prisons (mostly former convents and monasteries seized during the Revolution) that housed the reputed enemies of the Republic. For almost a week, rioters engaged in a rampage of destruction and murdered between 1,000 and 1,500 of the inmates, including many church officials who had been incarcerated following their refusal to take the oaths and thus effectively sentencing them to death for being nonjurors. During the following two years, hundreds of clergy and nuns were murdered in Paris and throughout many parts of France, and perhaps as many as 40,000 emigrated.<sup>64</sup>

In Year II (fall 1793 to fall 1794), the Jacobin revolutionaries began to turn their animus toward Protestants and Jews, and added them to their growing list of enemies of the *patrie*.<sup>65</sup> Year II, which is sometimes equated with a campaign of “de-Christianization,” has been described as having “cast a heavy shadow on the future.”<sup>66</sup> Priceless French cultural treasures of religious architecture, sculpture, painting, and stained glass were looted or destroyed. From the Cathedral of Notre Dame in Paris, hundreds of medieval sculptures of prophets, priests, and kings were decapitated, ripped from their coves, and ignominiously tossed into the Seine. The cathedral’s thirteenth and fourteenth century stained glass windows suffered the same shattered fate as the windows of almost every other church in France.<sup>67</sup> Yet even in its damaged state, the cathedral in Paris survived. The same cannot be said for the Third Abbey Church at Cluny, a masterpiece of Romanesque architecture and the largest building in Europe until the sixteenth century. At its medieval peak, Cluny was the most powerful ecclesiastical and intellectual center in

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62. Alston, *supra* note 48, at 182.

63. Langlois, *supra* note 2, at 168. For the American parallel, where the Pledge of Allegiance was used to justify abuse against “non-pledgers,” see *infra* text accompanying notes 282–95.

64. FRENCH REVOLUTION, *supra* note 2, at 106.

65. HIGONNET, *supra* note 48, at 235.

66. VOVELLE, *supra* note 48, at 175.

67. The windows of the cathedral at Chartres and the church Ste-Chapelle in Paris were virtually the only survivors.

Europe. By the time the Revolution had completed its de-Christianization, the abbey was a pile of rubble. The abbey church of Saint Denis outside Paris, whose apse was the first example of Gothic architecture and whose stained-glass windows prompted the writing of one of the most important medieval documents on visual aesthetics, did not escape the rampage. As the burial church for the kings and queens of France, Saint Denis was a prized symbolic target. The royal tombs were ripped open and the skeletons tossed in fields.<sup>68</sup> By starkly polarizing church and state, the revolutionary crowds demolished a cultural legacy of France. The scope of destruction of the revolutionary de-Christianizers makes the Taliban's blasting of the Bamiyan Buddha appear to be only some modest housekeeping by comparison.

On February 21, 1795, after the worst of the terror was over, a new law on separation of church and state was adopted, which affirmed the principle of free worship and declared that the state would not subsidize any religious minister. But even with this comparatively progressive law, the legacy of state control over religious symbols endured. Echoing an April 1792 Constituent Assembly "decision in principle" that priests must not wear clerical attire in public,<sup>69</sup> and foreshadowing the debates on headscarves in the twenty-first century, the separation law prohibited anyone from wearing "religious ornaments or clothing" in public.<sup>70</sup>

Although one might argue that not all of these actions targeted the Catholic Church per se, the combination of legislative measures, enforcement actions, and spontaneous crowd violence created "a climate that should be characterized by its deep hostility to the religion that was considered as being inseparable from the ancient regime."<sup>71</sup> But in addition to observing the examples of hostility during the Revolution, it also is important to note what may have been an equally serious problem: the recurring demand that citizens choose between their religion and the state. Nigel Aston, who does not hide his sympathy for the Catholics of the revolutionary period,

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68. ASTON, *supra* note 48, at 191–93; HIGONNET, *supra* note 48, at 235.

69. HIGONNET, *supra* note 48, at 235.

70. 156 LE MONITEUR UNIVERSEL 640 (Feb. 24, 1795) (or 3 ventôse, an III in the Revolutionary calendar).

71. See MESSNER, *supra* note 35, at 87. It is important to identify such conflicts that demonstrate that during its historical development *laïcité* was enmeshed in intolerance, divisiveness, and conflict.

concludes that the Assembly's demands in 1790 and 1791 for priests to swear oaths of primary loyalty to the state "destroyed the revolutionary consensus of 1789."<sup>72</sup> The Assembly had unnecessarily demanded "a stark choice between religion and revolution."<sup>73</sup> It was as if a person could not be genuinely Catholic and genuinely French.<sup>74</sup>

## *2. The second wave: the Third Republic*

Between the French Revolution and the Third Republic (1870–1940), France underwent several changes of regime. During this period, the relations between church and state also went through several phases. It was, however, the second decade of the Third Republic, beginning in 1879, when the next major developments of *laïcité* occurred, and by which time the term had been coined and was being used with increasing frequency.<sup>75</sup> Between 1880 and 1905 there were three overlapping waves of actions that, once again,

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72. ASTON, *supra* note 48, at 161.

73. *Id.* at 162.

74. It would be incorrect to assume that there were no positive examples of tolerance emerging from the revolutionary period. Interspersed with these conflicts, some relatively liberal and pluralistic proposals were briefly adopted. Messner differentiates three separate currents of thought regarding religion and the state in the ten years following 1789: one that sought to secularize in a direction of pluralism, one that sought to submit the Catholic Church to a severe Gallicanism, and a third that conducted a campaign of de-Christianization. MESSNER, *supra* note 35. Some of the relatively more pluralistic laws, which are often used to describe the more benign aspects of the Revolution, include (obviously) the Declaration of the Rights of Man, Article I of the Constitution of 1791, and Article 7 of the Declaration of Rights of 1793.

75. It should be noted that this brief survey of some conflicts in French society is not a full history of *laïcité*. For example, three of the enduring monuments of the 1880s are the Education Laws of 1881 (loi Ferry), 1882 (loi Ferry), and 1886 (loi Goblet). Moreover, the Law on Associations of 1901, which was used in part to target religious congregations, also included some provisions that are among the world's most progressive with respect to rights of association. Law on the Contract of Association of July 1, 1901, J.O. July 2, 1901, 4025 [hereinafter 1901 Law]. For the constitutional significance of the 1901 Law, as amended, see the decision of the *Conseil Constitutionnel*, July 16, 1971, *translated in* JOHN BELL, FRENCH CONSTITUTIONAL LAW 272–73 (1998). For some major historical treatments of religion and state during this period, see CHURCH AND STATE, *supra* note 2, at 45–63, 149–75; JEAN-MICHEL DUHART, LA FRANCE DANS LA TOURMENTE DES INVENTAIRES (2001); JEUFFROY & TRICARD, *supra* note 19, at 410–19; MONA OZOUF, *supra* note 2; MALCOLM O. PARTIN, WALDECK-ROUSSEAU, COMBES, AND THE CHURCH: THE POLITICS OF ANTI-CLERICALISM, 1899–1905 (1969).

targeted particularly Catholic congregations in an effort to suppress them.<sup>76</sup>

On March 29, 1880, the cabinet presided by Charles Louis de Freycinet issued (with questionable legal authority) two decrees. The first suppressed the Society of Jesus (Jesuits), and the second required all “unauthorized” religious congregations to apply for legal recognition within three months. Although the decrees were not fully or consistently enforced, several raids were conducted throughout the country, including eleven predawn raids on religious houses in Paris.<sup>77</sup> It appears that 261 houses and institutions were closed and that between 5,000 and 10,000 monks were evicted. The expulsions gave the Catholic press numerous examples of allegedly pious people being evicted from their communities. Between 1880 and 1905, more than two dozen laws were promulgated that promoted *laïcité* in ways ranging from placing civil disabilities on those who had received a religious education to preventing religious manifestations in streets during funeral processions.<sup>78</sup> The spirit of *laïcité* could act with the same intolerance that it accused others of exemplifying.<sup>79</sup>

On July 1, 1901, France adopted its famous Law on Associations, which, as amended, continues to form the core of French association law.<sup>80</sup> Articles 13 through 18 of the original law,<sup>81</sup> which was replaced in 1942 during the Vichy regime, required all “religious congregations” (which were not defined in the law but were understood to include institutions such as monasteries, convents, religious hospitals, and religious schools) to apply for authorization, which could be granted only by a parliamentary statute specifically approving the congregation. Any congregation not receiving parliamentary approval would be “outside the law” and subject to confiscation. All congregations were required to apply within three months. During the next four years, as parliament

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76. Additional measures were taken to reduce the influence of religious congregations in public education. Such measures are not being considered here.

77. See CHURCH AND STATE, *supra* note 2, at 51. Because of the questionable legal authority, many groups never complied and ultimately remained in place. See also OZOUF, *supra* note 2, at 63 (“Expulsions against congregations and communities (totaling 261, which consisted of 5,643 monks) followed shortly after the publication of the two decrees.”).

78. NOTRE LAÏCITE, *supra* note 2, at 88–89.

79. *Id.* at 25.

80. See 1901 Law, *supra* note 75.

81. *Id.*

refused to enact laws authorizing the congregations, hundreds were closed and several thousand monks and nuns sought exile outside of France. During the following four years additional decrees and laws were passed, including measures such as prohibiting any member of a congregation from teaching in school.

On December 9, 1905, the National Assembly adopted the Law on the Separation of Churches and the State.<sup>82</sup> Articles 3 through 6 effectively expropriated all religious property that had been acquired or built prior to 1905, and established procedures for state officials to conduct inventories of the property. The French state continues to own church buildings constructed before 1905, including all of the famous cathedrals of France, though it pays for their maintenance and allows the Church to use them.<sup>83</sup> The law also unilaterally revoked the Concordat of 1801, which had provided that the state would pay clerical salaries in compensation for lands seized during the Revolution.<sup>84</sup> By seizing church property and refusing to salary the clergy, the state effectively rendered the Church destitute. During the following months, as state officials attempted to take custody of church property and valuables, riots and violence broke out in several places in France. All religious associations were required to reregister with the state, but Catholic churches refused to do so under the 1905 law, leaving them without a formal legal status until after World War I.<sup>85</sup>

We may at least take comfort in the fact that the Third Republic was less bloody than the First. Nevertheless, if *laïcité* was a “fruit of French history,” as President Chirac suggested, it was bitter fruit indeed. As Émile Poulat has observed, to think of *laïcité* as a unifying agreement (*pacte*) among the French, is to “forget and ignore the initial violence that was imposed in the process of separating church and state.”<sup>86</sup> The examples of conflict cited above do not purport to give a full explanation of the historical circumstances that gave rise to the modern doctrine of *laïcité*—and

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82. Law on the Separation of Churches and the State of Dec. 9, 1905, J.O. Dec. 11, 1905, 7205. For the current version of the 1905 law, as amended, see <http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm> (last visited Mar. 11, 2004); *see also* BAUBEROT, HISTOIRE DE LA LAÏCITE FRANÇAISE, *supra* note 2, at 89–91.

83. CHURCH AND STATE, *supra* note 2, at 152–53.

84. *Id.*

85. *Id.*

86. NOTRE LAÏCITE, *supra* note 2, at 106.

reasonable people may disagree about which of the measures were necessary or appropriate given the deep and complicated issues surrounding the wealth, power, and influence of the Catholic Church. Nevertheless, the notion that *laïcité* embodies “tolerance,” “neutrality,” and “equality” should be seen for what it is: a myth.

### *B. The Historical Roots of Religious Freedom*

In 1966, the U.S. Congress considered an amendment to the Constitution that would permit prayers in school. In opening a hearing on the question, the Chairman of the Senate Subcommittee on Constitutional Amendments, Birch Bayh, said: “Our forefathers came here not to seek religious freedom for all, as myth would have it, but freedom to propagate their own particular kind of religion.”<sup>87</sup> This American myth, in its simplest form, imagined that Europeans first immigrated to America in pursuit of religious freedom and that it subsequently became a founding and cherished principle of the United States.<sup>88</sup> Any serious examination of American religious history reveals just how inaccurate this notion is.<sup>89</sup> Among the first laws enacted in Virginia was one that fined residents who failed to attend Sunday service one pound of tobacco, which would be raised to fifty pounds if they failed to attend for a month.<sup>90</sup> The law also provided that there shall be “uniformity in our church as neere as may be to the canons in England” and that “all persons yeild readie obedience unto them under paine of censure.”<sup>91</sup> Although the Virginia legislators’ religious sensibilities prompted them to punish those who did not attend church and whose opinions were unorthodox, such sensibilities did not extend so far as to censure the

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87. *School Prayer: Hearings on S.J.R. 148 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong. 2 (1966).

88. See *supra* Part II.B.

89. The following discussion is not a full history of religion in America. It is provided for the limited purpose of showing that the mythical version of America as having been founded on principles of religious freedom is unfounded. Among the major sources dealing with the history of religion in America are: SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1975); EDWIN SCOTT GAUSTAD & LEIGH E. SCHMIDT, THE RELIGIOUS HISTORY OF AMERICA (rev. ed. 2002); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); WILLIAM R. HUTCHISON, RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL (2003) (identifying religious prejudice as deriving from behavior, not theology).

90. See 1 COLONY LAWS OF VIRGINIA, 1619–1660, at 123 (John D. Cushing ed., 1978).

91. *Id.* (original spelling preserved).

practice of human slavery, which began in Jamestown as early as 1619.<sup>92</sup>

When referring to the religious beginnings of America, one of the most frequently referenced documents is the Mayflower Compact of 1620 and its invocation of divine favor on the new settlers.<sup>93</sup> But when praising the Puritans' combination of faith in God and the laws of the land, those who praise the Mayflower Compact do not typically acknowledge the legal system that was actually implemented by the Puritans. The 1648 "Lauues and Libertyes" of Massachusetts, adopted the punishment of banishment for Jesuits or for anyone who criticized infant baptism.<sup>94</sup> If a Jesuit were to return after having once been banished, "he shall be put to death."<sup>95</sup> Execution was also the punishment for anyone who "shall HAVE OR WORSHIP any other God, but the LORD GOD."<sup>96</sup> Other capital offenses included being a witch, a blasphemer, or a child who cursed his parents.<sup>97</sup> Between 1648 and 1688, five women in the Boston area were executed for practicing witchcraft,<sup>98</sup> and sixteen more practitioners of witchcraft were hanged in the Salem Common in 1692.<sup>99</sup> Mary Dyer, a Quaker, was hanged on Boston Common in 1660 for heresy after refusing to stop preaching that human beings may have a direct relationship with God without intervention of the clergy and that infant baptism was wrong.<sup>100</sup> Three other Quakers were hanged on the Boston Common for heresy between 1659 and 1661. Although the Puritans of Massachusetts and the Anglicans of Virginia believed in God,

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92. MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 57 (1984) [hereinafter MARTY, PILGRIMS].

93. Among many examples, the two congressional reports recommending adding "under God" to the Pledge of Allegiance in 1954 cited as precedent the Mayflower Compact of 1620. H.R. REP. NO. 83-1693, at 2340 (1954), *reprinted in* 1954 U.S.C.C.A.N 2339; S. REP. NO. 83-1287, at 5985 (1954), *reprinted in* 100 CONG. REC. 6348.

94. For more, see the facsimile edition of the 1648 LAUUES AND LIBERTYES, THE LAWS AND LIBERTIES OF MASSACHUSETTS (1929). For the banishment of the Jesuits, see *id.* at 26. For the banishment of those opposing infant baptism, see *id.* at 2.

95. *Id.* at 26.

96. *Id.* at 5.

97. *Id.* at 5-6.

98. RICHARD WEISMAN, WITCHCRAFT, MAGIC, AND RELIGION IN 17TH-CENTURY MASSACHUSETTS 192-203 (1984).

99. *Id.* at 193-203.

100. MARTY, PILGRIMS, *supra* note 92, at 86-87.

witchcraft, and slavery, they certainly did not believe in religious freedom.

While some of the early American colonial settlements undertook experiments with religious freedom—including, most admirably, Rhode Island and Pennsylvania—they were the exception rather than the rule. In 1649, Catholic Maryland adopted its famous “Act Concerning Religion.”<sup>101</sup> This law prohibited the molesting of all who professed to believe in Jesus Christ, regardless of whether they were Protestant or Catholic. Although the Act was a remarkable statement of toleration within the seventeenth-century American-European context, it nevertheless established the death penalty for those who did not believe in the Trinity and also prohibited any reproachful utterances against the Virgin, the apostles, or the evangelists. Though most legislators supported the law as a way to lessen religious conflict, the Puritans of Maryland opposed it because it was too lax. When their co-religionists in England seized control of the state during the English Civil War, the American Puritans appealed to the mother country to suppress the law. After Cromwell came to power in England, the Puritans of Maryland and Virginia joined forces to oust the Catholics and revoke the act in 1654.<sup>102</sup> Jesuit estates were plundered, all Catholic priests were forced into exile, and four Catholics were executed.<sup>103</sup> The Maryland experiment in religious toleration—albeit only for Trinitarian Christians—lasted only five years.

Virulent anti-Catholicism, apparent even in predominantly Catholic Maryland, was pervasive in America during the seventeenth and eighteenth centuries. “Colonial history is full of overt and explicit anti-Catholicism.”<sup>104</sup> Laws discriminating against Catholics existed throughout the colonies in the seventeenth century. “In some cases this legislation was supported by the very Huguenots who had fled France for their lives.”<sup>105</sup> Even Pennsylvania, which had long resisted pressures from England to enforce laws prohibiting Catholics from voting or holding political office, finally succumbed in 1705.<sup>106</sup> Such laws against Catholic participation in political life

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101. AHLSTROM, *supra* note 89, at 334–35.

102. *Id.*

103. *Id.*

104. *Id.* at 558.

105. *Id.* at 558–59.

106. *Id.* at 341.

continued to exist throughout the colonies through much of the eighteenth century.<sup>107</sup> In 1774, the English Parliament, in an action that combined political astuteness and religious tolerance, adopted the Quebec Act for that newly conquered land.<sup>108</sup> The Quebec Act provided for religious freedom for the predominantly Catholic population of that colony. The colonists south of Quebec did not rejoice in celebrating the new found religious freedom for their Catholic neighbors to the north, but bitterly denounced it. The protests in the First Continental Congress, then meeting in Philadelphia, were violent. “Had not the War for Independence begun, another season of domestic intolerance would undoubtedly have followed.”<sup>109</sup> Although the Quebec Act provided in relevant part only for the freedom of religion for Catholics, the Continental Congress and provincial legislatures throughout America condemned it for having established a tyranny.<sup>110</sup>

It is of course true that freedom of religion is the first right identified in the Bill of Rights, but it is only rhetoric that elevates it to being considered the “first freedom” as is often suggested. The founding fathers certainly did not include the language about “free exercise of religion” in the text of the original Constitution. The Constitution of 1787 specified several other rights that have a better chronological claim as a first freedom.<sup>111</sup> The congressional debates leading to the adoption of the Bill of Rights did not originally assert that religious freedom had primacy over other rights. And the fact that the First Amendment is now numerically the first comes not from any stated principle about its primacy, but from the simple fact that the first two clauses of the original proposals to amend the Constitution were not ratified—thereby making it the first amendment only by default.<sup>112</sup>

Even after the Constitution and Bill of Rights were ratified, religious freedom did not manifest itself as a unifying foundational

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107. *Id.*

108. GUNN, *supra* note 37, at 73–78.

109. AHLSTROM, *supra* note 89, at 528.

110. For examples of the vituperative colonial denunciations of the Quebec Act’s provisions providing religious liberty to Catholics, see GUNN, *supra* note 37, at 75.

111. The Constitution of 1787 included general prohibitions against suspending writs of habeas corpus, bills of attainder, ex post facto laws, direct personal taxes, religious oaths for public office, and letters of marque and reprisal (by states). The Constitution also provided several rights relating to the criminally accused.

112. CREATING THE BILL OF RIGHTS 37–38 (Helen E. Veit et al. eds., 1991).

principle. “Anti-Catholicism was endemic in all the Protestant settler groups. It existed among the enlightened and reasonable founding fathers, and among the unchurched. It was as old as 1607 and the first settlement and as new as the newest contact.”<sup>113</sup> Even “enlightened” figures of the eighteenth-century American struggle for religious liberty, such as Thomas Jefferson, engaged in anti-Catholic denunciation.<sup>114</sup> The founding father John Jay, who served his country as Chief Justice of the United States, as governor of New York, in legislatures, as an ambassador, and as one of the authors of the *Federalist Papers*, was not above deep-seated prejudice. He sponsored legislation to deny Catholics political rights unless they renounced their allegiance to the pope.<sup>115</sup>

The term most frequently used by historians to identify anti-Catholicism is “nativism,” which refers principally to the attitudes of the white, Anglo-Saxon Protestants who insulted, attacked, slandered, and legislated against Catholics, particularly those who were recent immigrants speaking foreign languages, and whose loyalty was questioned because of their allegiance to the pope.<sup>116</sup> In a new round of anti-Catholicism in the 1820s, Catholic convents and other communities were savagely ridiculed in the pages of yellow journalism.

Those who despised and feared these communities fantasized about the possible sexual character of transactions that “must have” gone on behind convent doors where celibate nuns lost their virginity to rapacious priests. There was always a market for bestsellers like the at-once lurid and dreary *Awful Disclosures of Maria Monk*, the most notorious of the fake exposés.<sup>117</sup>

Fabricated stories about people who escaped from the clutches of the clergy to reveal the “truth” about Catholicism were eagerly devoured by a gullible public. In a striking parallel to some European antisect fears in the 1980s and afterwards, the nativists captured

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113. MARTIN E. MARTY, A SHORT HISTORY OF AMERICAN CATHOLICISM 107–08 (1995) [hereinafter MARTY, AMERICAN CATHOLICISM].

114. AHLSTROM, *supra* note 89, at 556.

115. RICHARD B. MORRIS, JOHN JAY: THE MAKING OF A REVOLUTIONARY 15 (1975).

116. AHLSTROM, *supra* note 89, at 556–68. We should not assume that nativists ever constituted a majority of the American, or even Protestant, population. In the words of William Hutchison, they were a “vigorous and noisy minority.” HUTCHISON, *supra* note 89, at 48.

117. MARTY, AMERICAN CATHOLICISM, *supra* note 113, at 100.

political control of Massachusetts and established a “Nunnery Committee” to investigate the sordid goings-on behind closed religious doors—only to learn later that there were no extant convents in Massachusetts.<sup>118</sup> The Nunnery Committee did not disband itself upon learning that there were no nunneries, but roamed the state in search of other evils to denounce.<sup>119</sup> Even prominent public figures, such as the inventor Samuel F.B. Morse and the famous clergyman Lyman Beecher, engaged in their own verbal campaigns against Catholics.<sup>120</sup>

Words sometimes led to violence. The nativists often expressed themselves with fire, as when they burned the Ursuline convent in Charlestown, Massachusetts, in 1834, and the houses and churches of Catholics in Kensington (now within Philadelphia) in 1844. This Philadelphia uprising was “the wildest and bloodiest rioting of the entire crusade.”<sup>121</sup> Catholic churches were burned along with Irish homes and disorder prevailed, leading to the deaths of thirteen and injuries to many more. Elsewhere boisterous Irish Protestant marches led to physical attacks on Irish Catholics.<sup>122</sup> Many Protestants, as part of their religious education, were taught to hate Catholics and were encouraged to build “seemingly impenetrable walls of division between Catholics and Protestants.”<sup>123</sup> In a vivid description, Professor Philip Hamburger summarizes the period:

Aroused by religious prejudice, fears about political and mental liberty, and fantasies about sexual violation, American mobs violently attacked Catholics. In the 1830s Protestants initiated the practice of burning down Catholic churches, their most notorious achievement being the destruction in 1834 of the Ursuline convent in Charlestown, Massachusetts. For decades afterward, Protestant mobs sporadically indulged in open conflict, often stimulated by both settled ministers and less respectable but gifted street preachers, such as the self-proclaimed Angel Gabriel, who—dressed in a white robe and announcing his presence with a brass horn—

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118. An earlier generation of nativists had helped make this true by taking actions such as burning of the Ursuline Convent in Charlestown. For information about the Nunnery Committee, see HUTCHISON, *supra* note 89, at 50–51.

119. *Id.* at 50.

120. AHLSTROM, *supra* note 89, at 562–63.

121. *Id.* at 563; see also JAY P. DOLAN, IN SEARCH OF AN AMERICAN CATHOLICISM: A HISTORY OF RELIGION AND CULTURE IN TENSION 50, 56–57 (2002).

122. DOLAN, *supra* note 121, at 56.

123. *Id.* at 57.

incited Protestants to attack Catholics and torch their houses and churches. In 1844, after an orchestrated campaign of anti-Catholic preaching, Protestants in the city of brotherly love ignited churches and battled against Catholics and local military companies, sometimes using cannons, and causing the streets to be “baptized in blood.”<sup>124</sup>

After a brief hiatus during the Mexican War (1846–48), anti-Catholic nativism sprang back to life. In the 1840s, several political associations were formed with patriotic names, such as the American Republican Party, the Native American Party, and later the Order of United Americans and the Order of the Star-Spangled Banner. The members of these associations attempted to keep their activities secret, and they traditionally responded that they “knew nothing” about the various associations. They became known collectively as the “Know Nothing Party,” though there was never an organization with this name. The Know Nothings asserted that “Americans must rule America” and pledged not to vote for any foreigners, which referred specifically to U.S. citizens who were Roman Catholic.<sup>125</sup> By 1854, the Know Nothings had become one of the most powerful political forces in the United States, having succeeded in electing seventy-five representatives to the U.S. Congress, and having become a major political force in nine states.<sup>126</sup> The anti-Catholic interest in electoral politics did not eliminate the occasional recourse to violence.

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124. HAMBURGER, *supra* note 89, at 216–17. The popular acclaim that Professor Hamburger’s book has received in some quarters reveals that it is not only politics, but also history, that makes strange bedfellows. Individuals in the political and religious Right have praised his detailed historical deconstruction of the “wall of separation” metaphor, which Hamburger argues was employed by anti-Catholic crusaders in the nineteenth century. The religious Right, which has long disdained the wall metaphor as an obstacle to reinstituting prayers and Bibles into public schools, was pleased by his scholarly exposé of the fact that it was religious intolerance, rather than constitutional neutrality, that gave life to the term in the nineteenth century. It seems, however, that such supporters may have failed to grasp a deeper significance behind all of this. They wish to throw out the wall metaphor for essentially the same reason that their nineteenth-century coreligionists erected it: to help ensure that their beliefs about religion would be an integral part of the public school curriculum. For an example of this “neutral” but “non-Catholic” public-school religion advocated by Protestants, see *infra* note 129. For a generous and insightful critique of Hamburger’s book, see John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869 (2003).

125. DOLAN, *supra* note 121, at 57; HUTCHISON, *supra* note 89, at 48–51.

126. AHLSTROM, *supra* note 89, at 565; HUTCHISON, *supra* note 89, at 48–49.

A decade later, in the mid-1850s, Protestants burned a dozen churches in different towns. In Sidney, Ohio, and Dorchester, Massachusetts, enterprising Protestants blew up churches with gunpowder. Riots between nativists and Catholic immigrants—often on the occasion of elections—left numerous injured and dead in the streets and engulfed portions of American cities . . . . Observing the mayhem in 1855, John Forney complained that Protestant leaders sought a sort of political proscription, “hunting down the Catholics as if they were so many wild beasts.”<sup>127</sup>

Throughout the nineteenth century, the rhetoric of the nativists and anti-Catholics was expressed in the language of American ideals, American values, American religion, and American patriotism. Prior to the 1890s, the language was used to justify laws and violence against the supposedly anti-American religions within the country. But by the beginning of the 1890s, these religious leaders turned their gaze beyond national boundaries. Certainly the most famous and influential example was Josiah Strong—a congregational minister, a member of the American Home Missionary Society, the general secretary of the Evangelical Alliance, and a widely influential author.<sup>128</sup> In his book, *Our Country*, he identified seven perils facing America: immigration, Roman Catholicism, Mormonism, intemperance, socialism, wealth, and the city. Though apparently not among the seven deadly sins, Strong also demeaned Jews, Slavs, and Italians. When his book was revised in 1891, he added an eighth “peril”: “religion and the public schools” (the peril being that something other than Protestant Christianity might be taught).<sup>129</sup>

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127. HAMBURGER, *supra* note 89, at 217 (citations omitted).

128. For a discussion of Strong’s importance, see WALTER LAFEBER, THE NEW EMPIRE 72–80 (1963). He was a “national figure” whose “goal was a Christianized world.” *Id.* at 73.

129. JOSIAH STRONG, OUR COUNTRY (Jürgen Herbst ed., 1963) (1891). Chapter 6, on religion in public schools, argued that the purpose of the public school was to create democracy. *Id.* at 89. Schools are “the principal digestive organ” of the body politic, and their purpose is to absorb the “children of strange and dissimilar races” and transform them all into “Americans.” *Id.* It is appropriate for public schools to teach religion, as long as it is not the Catholic religion. “The object of the public school is to make good citizens. The object of the parochial school is to make good Catholics.” *Id.* at 90. It would be much better for Catholics to receive a public-school education rather than a parochial-school education. *Id.* at 93. Most Catholics “will not object to what little religious instruction their children receive in the public school.” *Id.* at 94. The public schools should thus teach Christian, but non-Catholic religion, though it would be a serious mistake, Strong euphemistically assures us, to imagine that this generic non-Catholic American religion should be called “Protestantism.” *Id.* at 95. Thus Strong’s version of the Christian religion is presented as being “neutral” while Catholicism is biased. This argument is a precursor to the assertion of the Ninth Circuit dissenters in

Strong could see that the United States—with “unequaled energy,” with the world’s “highest civilization,” with the “purest” form of Christianity, and with its “peculiarly aggressive traits”—would be able to use its economic and military power to spread its civilizing influence throughout the world.<sup>130</sup>

Even at the beginning of the twentieth century, state laws institutionalized religious discrimination. In his summary of many of the state laws of the period where legislators had attempted to control religious minorities, Professor John Witte noted that:

[L]ocal legislatures began to clamp down on . . . dissenters. At the turn of the twentieth century and increasingly thereafter, local officials began routinely denying Roman Catholics their school charters, Jehovah’s Witnesses their preaching permits, Eastern Orthodox their canonical freedoms, Jews and Adventists their Sabbath-day accommodations, non-Christian pacifists their conscientious objection status. As state courts and legislatures turned an increasingly blind eye to their plight, religious dissenters began to turn to the federal courts for relief.<sup>131</sup>

Far from promoting any doctrine of freedom of religion, many state laws were designed to promote the majority religion at the expense of minorities.

Although anti-Semitism had long been a problem in the United States, it often was less extreme than in other countries. For much of American history, anti-Semitism expressed itself in social and political exclusion rather than in violence. During the 1920s and 1930s, however, coinciding with the coming to power of the Nationalist Socialist Party in Germany, the rhetoric of anti-Semitism in the United States became much more virulent.<sup>132</sup> Several individuals and

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Newdow, who argue that adding “under God” to the Pledge of Allegiance was a neutral act while removing it would be tantamount to “establishing atheism.” See *infra* notes 343–44.

130. In *Our Country*, Strong asserted that the “Anglo-Saxon race” with its “unequaled energy, with all the majesty of numbers and the might of wealth behind it—the representative, let us hope, of the largest liberty, the purest Christianity, the highest civilization—having developed peculiarly aggressive traits calculated to impress its institutions upon mankind, will spread itself over the earth.” STRONG, *supra* note 129, quoted in SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT 277 (3d ed. 1993).

131. JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 100 (2000).

132. AHLSTROM, *supra* note 89, at 972–76, 1006–07; GAUSTAD & SCHMIDT, *supra* note 89, at 272–74.

groups, who proudly proclaimed their American and Christian identity, spewed forth noxious rhetoric. Foremost among these were Father Charles E. Coughlin (whose popular radio talk show spread his invective), the Ku Klux Klan, and the Fundamentalist preacher Gerald Winrod.<sup>133</sup> They blamed Jews, Negroes, Catholics, immigrants, and their unpatriotic white sympathizers for the moral decline in the United States. Catholic Alfred E. Smith's campaign for the presidency was marred by religious attacks from many in the Protestant community, as was John Kennedy's campaign thirty-two years later. A striking characteristic of many of these movements was their proud display of the American flag and their insistence that they represented the real America, as opposed to the immigrants, foreigners, Catholics, and Jews.

If religious freedom was a founding principle of the republic, as modern American rhetoric fondly professes, Americans certainly seem to have been unaware of it until rather recently. For practical purposes, the Supreme Court did not begin to apply the First Amendment to support religious freedom claims until the 1920s, and then only with regard to rights of private religious schools.<sup>134</sup> In the 1920s, the Ku Klux Klan proudly paraded unmolested under American flags down city streets, including Pennsylvania Avenue in Washington, D.C., while Jehovah's Witnesses were persecuted for honoring their God and their belief that pledging the American flag was a form of idolatry.<sup>135</sup> It was not until the 1940s that the first powerful and inspiring modern decisions regarding religious speech and other manifestations of religion were published. Perhaps the most impressive of these decisions, *West Virginia State Board of Education v. Barnette*, came in the wake of widespread violence against Jehovah's Witnesses because of their insistence that their highest loyalty was to God.<sup>136</sup> It was not until 1940 that the Free Exercise Clause was found to be applicable to the states.<sup>137</sup> Social and political, though not legal, discrimination against Catholics and Jews

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133. See GAUSTAD & SCHMIDT, *supra* note 89, at 274.

134. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

135. For further discussion of the Pledge, flag salute, and Jehovah's Witnesses, see *infra* text accompanying notes 285–95.

136. 319 U.S. 624 (1943).

137. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

was open and notorious well into the 1960s.<sup>138</sup> And it was not until the 1960s—with the election of the first Catholic president, John F. Kennedy, the adoption of the Civil Rights Act of 1964, and several decisions of the Supreme Court—that what is now described as “the first freedom” and the founding principle came to be very widely accepted—almost two hundred years *after* the founding of the United States.<sup>139</sup> In short, to imagine that religious freedom is the first freedom is inaccurate, both historically and constitutionally.

The French and American founding myths of *laïcité* and of religious freedom are revered as foundational cornerstones of the republics; they are described as emerging gloriously from the historical past; revered as explaining the essence of the nation’s values; invoked as principles that unite all true citizens of the republic; promoted as models for export to other nations; and held to exemplify and embody the universal values of equality, state neutrality, tolerance, and respect for freedom of conscience. However much we might admire the modern explanation of such concepts, we should not overlook that they emerged from periods of hostility, antagonism, discrimination, and often violence.

#### IV. *LAÏCITÉ, THE HEADSCARF, AND THE STASI COMMISSION*

##### *A. The Role of Public Schools in France*

France and the United States, like most countries, believe that public schools are entrusted to teach the nation’s values and histories

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138. In his attempt to summarize the hostility of Protestants against Catholics, Dolan suggests that the animus came not on theological grounds, but from a “debate over the relationship between religion and nationality. Indeed, it was a question of national identity.” DOLAN, *supra* note 121, at 92.

139. Some of the clearest illustrations of the widespread acceptance of religious freedom in reality (rather than only in myth) were in the 1990s, when broad coalitions—including both the political Left and Right—supported legislation known as the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, and the International Religious Freedom Act of 1998, *see supra* note 39. This does not mean that religious freedom is always respected. For many examples of ongoing discrimination and intolerance against religious minorities in the country today, see DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION 294–334 (2001).

The harsher aspects of American religious intolerance are sometimes given passing recognition. The State Department report, cited previously, stated that religious freedom “was not easily achieved. Today Americans enjoy religious freedom, but it was not always so. Our history is not perfect, and yet that very history makes us all the more determined to protect what has been won.” ANNUAL REPORT, *supra* note 40.

to their youth. Michael Walzer has observed that every nation strives “to teach all of its children, whatever their group memberships, the value of its own constitutional arrangements and the virtues of its founders, heroes, and current leaders.”<sup>140</sup> Traditionally in France, “the teaching of civic and moral duties was an important part of the school curriculum, how love for the nation was preached as something expected of the child, in the same way as love for his mother.”<sup>141</sup> The “greatest function” of the French school was not academic training, but the teaching of patriotism.<sup>142</sup> Theodore Zeldin argues that in France “universal education and the republic became inextricably identified with each other.”<sup>143</sup> In nineteenth-century France, at the same time that the state was making education more secular, “education became almost a substitute for religion; belief in its virtues reached exceptionally high levels.”<sup>144</sup> Because of the public demands that schools teach national values, the schools necessarily become a battleground for deciding what those values are. Just as in the United States,<sup>145</sup> French schools frequently become the focal point for conflicts over defining national values, including those involving the ideology governing the relationship between religion and the state. Thus, issues involving *laïcité* are often confronted in the schools of France.<sup>146</sup> A proposed law in 1983 to enhance state control over private religious schools “provoked some of the largest street demonstrations seen in France since World War

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140. MICHAEL WALZER, ON TOLERATION 71 (1997).

141. ZELDIN, *supra* note 58, at 17.

142. EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870–1914, at 332 (1976). Weber further asserted that teaching French history was the best way to teach patriotism. *Id.* at 333. In commenting on one aspect of France’s nineteenth-century transition from principally religious-based education to secular education, Crubellier and Langlois both note that history was transformed from being a study of the sacred (“In the beginning, God created . . .”) to becoming sacred itself (“Our ancestors, the Gauls . . .”). MAURICE CRUBELLIER, L’ÉCOLE RÉPUBLICAINE, 1870–1940, at 56 (1993); Langlois, *supra* note 2, at 154.

143. ZELDIN, *supra* note 58, at 199.

144. *Id.* at 140. It is common for historians of the period even to refer to the religious zeal with which the republicans of the 1880s set about the process of laicization. It was as if they wished to sacrifice the secular. Ozouf refers to the republicans’ wish to have the schools “baptized as confessional neutrality.” OZOUF, *supra* note 2, at 74.

145. See *infra* Part IV.C.3.

146. Langlois, *supra* note 2, at 154–56, 169. The distinguished historian Mona Ozouf has said that, between 1871 and 1914, there were no questions that were more stormy than those involving issues of education. This is particularly true when it involves the issue of *laïcité* in schools. OZOUF, *supra* note 2, at 5.

II.”<sup>147</sup> In 2003, as the debate on the role of headscarves in France grew in intensity, former Socialist Prime Minister Laurent Fabius described public schools in words that might equally have been employed by political officials in most of the major parties: “[T]he school is not just one among many places; it is the place where we mold our little citizens. There are three legs: *laïcité*, Republic, school; these are the three legs on which we stand.”<sup>148</sup>

### *B. Background and the Emergence of the Headscarf Controversy*

In September 1989, in a French town 50 kilometers north of Paris, three Muslim girls were temporarily barred by officials from attending public schools because they insisted on wearing Islamic headscarves.<sup>149</sup> A local newspaper seized upon the story and wrote provocative articles that soon stirred interest throughout the country.<sup>150</sup> In order to respond to the growing controversy, the Minister of Education, Lionel Jospin (later prime minister), requested a formal opinion (*avis*) from the highest French

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147. BELL, *supra* note 80, at 320. After its enactment, portions of the famous “*loi Savary*” were held unconstitutional by the French *Conseil Constitutionnel*.

148. Laurent Fabius, *Le Principe émancipateur et unificateur de la laïcité*, May 17, 2003, <http://www.psinfo.net/entretiens/fabius/laicite.html> (last visited Mar. 11, 2004).

149. I will use the word “headscarf” throughout to refer to the head covering worn by Muslim girls and women. A variety of words in English, French, and even Arabic are used to identify the headscarf. The word that is now most commonly used in French is *voile*, which is linguistically related to the English “veil.” The other terms that are used, albeit with declining frequency, are *foulard* (which means “scarf”) or more specifically *foulard Islamique* (which of course means “Islamic scarf.”) Whereas *voile* or “veil” might suggest that the face is covered, as in a bridal veil, this is not the sense in which it is now used by the French when discussing the issue. In France, Catholic nuns who wear a religious habit are also said to wear *le voile*, just as “veil” in English is sometimes used to describe a Catholic nun’s clothing. In French, as in English, *voile* or “veil” is more likely to bear a religious connotation where *foulard* or *scarf* is not. The Arabic word most commonly used by Muslims in Europe and America to identify the headscarf is *hijab* (sometimes transliterated as *hejab* in French). The correct *Qur’anic* meaning of the term *hijab*—and its implications for women’s attire in the contemporary world—is the subject of an intense debate even within Muslim communities. For further discussion of this issue, see *infra* note 228.

150. Subsequent discussions at the school in the town of Creil led to a temporary compromise and the girls returned to school a few weeks later. See Guy Coq, *Querelle autour d’un voile*, L’HISTOIRE No. 6 (1999), <http://www.histoire.presse.fr/archives/coq6.asp> (last visited Mar. 10, 2004). For a personal account of the developments, see the report attributed to Luis Cardoso, an instructor at the school in *Au coeur d’l’affaire: Un Professeur de Creil témoigne*, at <http://www.unc.edu/depts/europe/conferences/Veil2000/articles/coeur1.htm> (last visited Apr. 24, 2004), *English version available at* <http://www.unc.edu/depts/europe/conferences/Veil2000/articles/translations/Cardoso.doc> (last visited May 29, 2004). For a scholarly discussion of the background, see MESSNER, *supra* note 35, at 1134.

administrative court, the *Conseil d'État* (the Council of State), on the question whether schoolchildren may wear “insignia” that identify their religious affiliation in the public schools.<sup>151</sup> The Minister’s query was framed specifically in terms of whether the wearing of religious clothing in public schools could be reconciled with the important French doctrine of *laïcité*. The *Conseil d'État*'s response was reasonably clear:

According to recognized constitutional and legislative texts, as well as the international obligations of France, the principle of *laïcité* in state education . . . requires that teaching be conducted with respect for the principle of neutrality by the teachers and their programs on the one hand, and with respect for the freedom of conscience of the students on the other. . . . Such freedom for the students includes the right to express and to manifest their religious beliefs inside the schools, while respecting pluralism and the freedoms of others. . . . The wearing of signs by students in which they wish to express their membership in a religion is not by itself incompatible with the principle of *laïcité*.<sup>152</sup>

The *Conseil d'État* asserted that the doctrine of *laïcité*, as well as the 1958 Constitution and French obligations under international law, *require* respect for the freedom of conscience of students, including the right to express their beliefs in schools by wearing religious clothing. The *Conseil d'État* cautioned, however, that students could be prevented from wearing religious attire if they attempted to propagandize others or to disrupt school activities. School officials were instructed to resolve such issues on a case-by-case basis.<sup>153</sup> Many people were unhappy with the *Conseil d'État*'s

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151. The *Conseil d'État*, among its several responsibilities, is the highest administrative court in France from which there is no appeal. Its jurisdiction generally involves issues that arise between the state and its citizens. It has the power to issue advisory opinions, as was the case here. It may hear separately appeals from lower administrative courts where individuals are involved in disputes with the state. A *Conseiller* is among the most prestigious positions in the French state. For an English-language description of the various functions of the *Conseil d'État*, see L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 62–86 (5th ed. 1998).

152. Avis du Conseil d'État No. 346893 (Nov. 27, 1989), *reprinted in JEUFFROY & TRICARD, supra* note 19, at 1031–32; Most judicial decisions of the *Conseil d'État* are handled in “Ordinary Assemblies.” Issues that are considered to be of particular importance, as was this, are decided by the “Plenary Assembly” in which all of the full members (*Conseillers d'État*) may participate. *See* BROWN & BELL, *supra* note 151, at 70–71.

153. The Ministry of Education issued new regulations following the opinion of the *Conseil d'État*, but they are less generous than the opinion of the *Conseil d'État* would seem to

decision, and afterwards “one could hear politicians, intellectuals, and even journalists insist that if the judges [of the *Conseil d’État*] refused to heed public opinion, it would be necessary to change the laws.”<sup>154</sup>

Since 1989, the number of Muslims has grown rapidly in France, and Islam is generally described as being the second largest religion after Catholicism.<sup>155</sup> The majority of Muslims in France trace their origins to former French colonies, particularly Algeria, Morocco, and Tunisia. With the growth of Islam, there have been increasing apprehensions regarding the appearance of Muslim women wearing the headscarf in public.<sup>156</sup> This has created the suspicion among some that those who wear the headscarf are not really French and that they prefer their Muslim (or perhaps even Islamic) identity over their French identity. Thus, the headscarf is increasingly seen as the symbol of a foreign people—with a foreign religion—who have come to France, but who do not wish to integrate themselves fully into French life or accept French values. From this perspective, when the French see the headscarf they do not feel pride that their country is tolerant and welcoming of other peoples and religions, but rather

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have warranted, and emphasize what is prohibited rather than what is permitted. La Circulaire du 12 décembre 1989 du ministre d’État, de l’Éducation nationale, de la Jeunesse et des Sports, reprinted in JEUFFROY & TRICARD, *supra* note 19, at 1034–35. A circulaire issued by the Ministry of Education in December 1989 nevertheless suggests that, whenever problems arise, school officials should attempt to dissuade girls from wearing the headscarf. See MESSNER, *supra* note 35, at 1135. Not all officials agreed with the *Conseil d’État*’s decisions and some local school officials continued to try to ban headscarves. *Id.* During the following years some additional cases came to the *Conseil d’État*. In some, the schools, despite the 1989 decision, attempted to ban headscarves. Such cases were reversed by the *Conseil d’État*. In one case, however, where school girls refused to remove the headscarf in conjunction with physical education activities, the *Conseil d’État* supported the local school’s rejection of the demand—noting in particular that the father of one of the girls had distributed provocative leaflets in support of his daughter’s case. *Id.* at 1134–38.

154. MESSNER, *supra* note 35, at 268.

155. There is no precise figure for the number of Muslims in France, and the estimates vary by as much as a factor of two, being somewhere in the three million to six million range. See LE MONDE, Dec. 18, 2003, LEXIS. Of course, combining all Muslims for demographic purposes is somewhat like combining all Christians. In any case, there are now more Muslims in France than there are Protestants and Jews combined. Dozens of books have been published on Muslims in contemporary France. Among those that are best known and most influential are: DOUNIA BOUZAR, L’ISLAM DE BANLIEUES: LES PRÉDICATEURS MUSULMANS, NOUVEAUX TRAVAILLEURS SOCIAUX? (2001); JOCELYN CESARY, ÊTRE MUSULMAN EN FRANCE: ASSOCIATIONS, MILITANTS ET MOSQUEES (1994); BRUNO ÉTIENNE, LA FRANCE ET L’ISLAM (1990); GILLES KEPPEL, LES BANLIEUES DE L’ISLAM: NAISSANCE D’UNE RELIGION EN FRANCE (1987); and XAVIER TERNISIEN, LA FRANCE DES MOSQUEES (2002).

156. For the different words used for “headscarf,” see *supra* note 149.

they feel something foreign and non-French has infiltrated their society. Writing just before the events in 2003 that raised the headscarf to a sensational media issue, some leading French legal scholars suggested the possibility that the real concern regarding the Islamic headscarf may not be related to high principles of a neutral republican education in public schools, but a deeper unease about Islam.

The debates regarding the headscarf (*foulard*) testify to the suspicion of French society in general regarding active or organized Islam. This suspicion, which displaced all of the past complex relations with the Islamic world, has often led to some to imagine, behind the behavior of some students, a concerted effort to subvert republican values. The reverberations of the headscarf (*voile*) issue in the media and in the political debate reveals a particularly French sensibility to Islam, which is not expressed in other major European countries with the same intensity. It is a given that the effects are difficult to measure in a legal debate.<sup>157</sup>

Although serious jurists have described the *Conseil d'État*'s 1989 decision as "nuanced and protective of individual rights,"<sup>158</sup> state officials, at both the national and local levels, repeatedly attempted to undermine it. After 1989, several contested cases came before the *Conseil d'État* concerning attempts by local officials to prohibit headscarves, as well as directives (*circulaires*) issued by the Minister of Education in 1989 and 1994 that attempted to limit the wearing of headscarves.<sup>159</sup> Although the *Conseil d'État* sometimes rendered judgments (*arrêts*) against Muslim schoolgirls or their families on the grounds that they had been unduly provocative, the vast majority of the judgments—forty-one of forty-nine by one count—were against state officials who were improperly attempting to ban headscarves.<sup>160</sup>

Conflicts related to the headscarves in school never disappeared, but they had declined in frequency and significance by early 2003. For example, a report released in November 2000 by the prestigious French advisory body, the *Haut Conseil à l'Intégration* (High

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157. See MESSNER, *supra* note 35, at 265.

158. See *id.* at 261.

159. *Id.* at 267.

160. See *id.* at 1135–38. The *Haut Conseil à l'Intégration* reported that "of the 49 disputed cases arriving at the *Conseil d'État* between 1992 and 1999, 41 led to a reversal of the decision of the school officials against the girl." HAUT CONSEIL A L'INTEGRATION, L'ISLAM DANS LA REPUBLIQUE 50 (2000).

Council for Integration), expressed its general satisfaction with the way that the potentially volatile issues surrounding the headscarf largely had been resolved by the approach recommended by the *Conseil d'État*. "Remembering that, for students, *laïcité* is a guarantee of their freedom of conscience and their right to manifest their faith, albeit within the strict limits of preserving order in schools, the *Conseil d'État* provided a judicial framework to assist state officials in preventing and resolving legal difficulties related to the wearing of the headscarf."<sup>161</sup> This condition apparently prevailed even after the drama of the attacks of September 11. In December 2001, in a special issue on education, the newspaper *Le Monde* concluded that: "Twelve years after headscarves first appeared in public schools, Islam and the republican schools lived together almost peacefully."<sup>162</sup> The *Traité de droit français de religion*, published in early 2003, concluded that "the jurisprudence of the *Conseil d'État* on the question of headscarves has not varied since 1989 and the first judgment of 1992, and the law seems well established by now."<sup>163</sup> In April 2003, Hanifa Chérifi, the Ministry of Education official responsible for mediating headscarf disputes in the nation's schools, reported that between 1994 (when she began her work) and 2003, the average number of problematic cases per year had dropped from 300 to 150.<sup>164</sup>

To the extent that there was a sense of confidence, progress, and calm early in 2003, it was only a calm before the storm. By the end of 2003, the issue of headscarves in schools had become the subject of a national media frenzy. Despite the fact that there were no dramatic new cases pertaining to schools and headscarves, by December of that year the subject was the most prevalent and controversial topic in the country. Many of the leading politicians, intellectuals, religious figures, and sociologists were either being interviewed by or writing articles for television, newspapers, magazines, and journals. The issue fully seized the popular

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161. HAUT CONSEIL A L'INTEGRATION, *supra* note 160, at 51.

162. *L'École en première ligne*, LE MONDE DE L'EDUCATION, Dec. 2001, at 23.

163. See MESSNER, *supra* note 35, at 1137; see also GARAY & TAWILL, *supra* note 6, at 225 (stating that the rules imposed by the *Conseil d'État* were "simple and clear").

164. *Polémique: Sous le voile islamique, l'oppression des femmes*, J. L'Humanité, Apr. 30, 2003, [http://www.humanite.presse.fr/popup\\_print.php3?id\\_article=371214](http://www.humanite.presse.fr/popup_print.php3?id_article=371214) (last visited Mar. 1, 2004) (interviewing Hanifa Chérifi); see also GARAY & TAWILL, *supra* note 6, at 225 (stating that "at the beginning of 2003, the French were not particularly excited about the issue").

imagination. A high percentage of the French population wanted Islamic headscarves banned from schools, and a clear majority even wanted them banned from streets and other public spaces.<sup>165</sup> What caused the truce suddenly to collapse and result in a demand for a law that would prohibit the headscarf at public schools?

The facts of the chronology are easier to identify than the underlying motives, interests, or political strategies of those involved. The first major salvo came on April 3, 2003, during a radio interview of Prime Minister Raffarin, who told his interviewers that headscarves should “absolutely” be prohibited in public schools.<sup>166</sup> Two weeks later, on April 19, the Minister of the Interior, Nicolas Sarkozy, when addressing a meeting of the Union of Islamic Organizations of France, provocatively said (given the audience) that women should be required to remove headscarves when having their official identification photographs taken.<sup>167</sup> The Reuters account of the meeting suggested that Sarkozy had “relaunched” the debate on headscarves and that it could become “one of the most important subjects of discussion” between the recently elected Muslim councils and the French state. Both Prime Minister Raffarin and Interior Minister Sarkozy were, of course, in the conservative governing party of France, the Union for a Popular Movement (UMP). On April 29, during his attendance at a meeting of the National Assembly, Prime Minister Raffarin was asked a question by Deputy François Baroin:

Is it not time, Mr. Prime Minister, to reaffirm forcefully the idea, which really is quite simple, that *laïcité* is the first sentinel and the ultimate bulwark of the unity of the nation? It appears essential to me to preserve the law of 1905 and its fundamental principles. How can we make it possible for state representatives, particularly those in education—our republican sanctuary—to experience less daily uncertainty about legal issues? Haze and ambiguity are

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165. For public opinion data, see *supra* note 6.

166. Interview by C. Ockrent & G. Leclerc with Jean-Pierre Raffarin, Prime Minister of France 7–8 (Apr. 3, 2003), <http://www.premier-ministre.gouv.fr/ressources/fichiers/0304feeraffarin.pdf> (last visited May 15, 2004). In his few words on the subject, Raffarin did not specifically suggest that Parliament should enact a new law. Some commentators later assumed that this was exactly what he had intended and that this was the first suggestion by a major governmental official to propose a law banning headscarves.

167. The Interior Ministry is responsible for state security, the national police, and citizen identification documents. It also houses the office responsible for regulating and supervising issues related to religious organizations.

actually the loyal allies of fundamentalists and all types can cause harm to an essential part of our social pact.<sup>168</sup>

In response to this question, the Prime Minister exclaimed that a “debate on the school and its future is taking place today throughout France!”—public schools are “the first place of the Republic” and they must not be threatened by “conspicuous signs (*signes ostentatoires*) of communalism” nor by “similar things that appear, from time to time, such as zealots, that need to be condemned in the name of republican *laïcité*.<sup>169</sup> By amending the law,

we will nourish the concept of *laïcité*, giving it even more force in modernity! We must make it clear that our national consensus is affirmed and we all must make it clear during the debate that schools must remain the space *par excellence* of the Republic, and therefore of *laïcité*.<sup>170</sup>

Deputy Baroin’s question to the Prime Minister on *laïcité* was not spontaneous. Baroin was the official spokesman for the UMP, the Prime Minister’s party. On the same day that he posed his question in the National Assembly, Baroin also published an editorial in the conservative newspaper *Le Figaro* in which he praised the Prime Minister for having “opportunely” opened the debate on *laïcité*, and he also applauded the Minister of the Interior for having “courageously” taken a position.<sup>171</sup> Earlier in the year, Baroin himself had been asked by the Prime Minister to prepare his own report on *laïcité*, which was completed and delivered to the President and Prime Minister a few days before the latter’s visit to the National Assembly. Baroin’s report was released publicly in late April, and in it he recommended that the Parliament enact a law to “proscribe wearing the headscarf (*voile*) in schools.”<sup>172</sup>

In a magazine article that also appeared in late April, Socialist Deputy Jack Lang (a former minister of education) reversed his prior position, in which he had supported the jurisprudence of the *Conseil d’État*, and announced that he would propose a law in the National

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168. Débats parlementaires, Journal Officiel de la République Française, 2d Sess., Apr. 29, 2003, at 3212.

169. *Id.*

170. *Id.*

171. François Baroin, *Société face au développement des revendications communautaristes; Pour un ‘code de la laïcité,’* LE FIGARO, Apr. 29, 2003.

172. FRANÇOIS BAROIN, POUR UNE NOUVELLE LAÏCITE 18 (2003).

Assembly to prohibit “all external signs of religious adherence” in public schools.<sup>173</sup> On May 17, Laurent Fabius, a Socialist deputy in the National Assembly (and former prime minister), addressed a party congress.<sup>174</sup> Fabius advocated the adoption of a new law that would prohibit the display of religious symbols (including the headscarf, skullcap, and cross) in public schools. Acknowledging that while the *Conseil d’État* had acted in good faith in making its school decisions, he nevertheless argued that it was not their “function” to make decisions about religious attire in schools and that their reasoning was “casuistic” and “not tenable.”<sup>175</sup> Ten days later, on May 27, the National Assembly established a parliamentary Inquiry Commission on the Question of Wearing Religious Signs at School (“Inquiry Commission”).<sup>176</sup> Thus, by the end of June, less than three months after Raffarin’s original statement, several prominent members of the National Assembly, including former ministers, had

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173. Eric Conan, *Jack Lang: “Interdire tout signe religieux,”* L’EXPRESS, April 30, 2003, <http://www.lexpress.fr/info> (last visited Mar. 10, 2004) (interviewing Socialist Deputy Jack Lang). Lang ultimately introduced his bill on November 18, 2003, which would have prohibited all “apparent” signs that were “religious, political, or philosophical.” Proposition de loi no. 1227 (Nov. 18, 2003). One can imagine the absurd questions that would confront school officials attempting to enforce the Lang proposal. A sweatshirt emblazoned with a drawing of “Descartes the philosopher” would be prohibited, but one labeled “Descartes the mathematician” would be permitted. “Noam Chomsky the linguist” would be acceptable but not “Chomsky the political critic.” And a t-shirt with a photo of Albert Einstein would be acceptable if praising him as a physicist, but would be impermissible if praising him as a campaigner against nuclear weapons. Lang’s proposal to introduce a law to prohibit religious attire was not the first, but it was the first by a present or former minister. Baroin had proposed such a law in his report to the Prime Minister, and two bills had already been introduced in the National Assembly by members of conservative parties, Proposition de loi no. 172 (Aug. 1, 2002) (proposed by Jacques Myard (UMP)), and Proposition de loi no. 500 (Dec. 18, 2002) (proposed by Maurice Leroy (UDF)).

174. Fabius, *supra* note 148.

175. In the French context, this is a remarkable observation. The jurisdiction of the *Conseil d’État* covers all state bureaucracies, including the schools. There is no other court in France that has the jurisdiction to cover such issues.

176. The parliamentary Inquiry Commission publicly released its multi-volume report on December 18, 2003, one day after President Chirac announced his proposal to prohibit conspicuous religious signs at school. ASSEMBLÉE NATIONALE, RAPPORT NO. 1275 (Dec. 4, 2003). The final report of the Inquiry Commission appears in three sections available at: <http://www.assemblee-nat.fr/12/pdf/rapports/r1275-t1.pdf>, <http://www.assemblee-nat.fr/12/pdf/rapports/r1275-t2.pdf>, and <http://www.assemblee-nat.fr/12/pdf/rapports/r1275-t2.pdf> (last visited Mar. 24, 2004).

Without speculating on the motives for the timing of the President’s speech, it can be said that the Stasi Report, *see infra* note 177, and the presidential speech completely overshadowed the issuance of the Inquiry Commission’s report and recommendations.

proposed that a law governing headscarves in schools be enacted and the Parliament had begun its own investigation and analysis.

On July 3, President Chirac announced that he too wished to create a commission that would study the issue and report to him by the end of 2003. He issued a decree creating a “commission charged with conducting an analysis of the application of the principle of *laïcité* in the Republic,”<sup>177</sup> which became widely known as the Stasi Commission after the name of its chairman, Bernard Stasi. The Commission’s report (“Stasi Report” or “Commission Report”), which will be discussed in the following section, was issued on December 11, 2003.<sup>178</sup> The Commission made several recommendations, including the improvement of living standards in some economically depressed communities and advocated improving education about both religion and *laïcité*. But the media focused almost exclusively on only one of the Commission’s recommendations: banning “clothing and signs manifesting religious or political affiliation” from public schools.<sup>179</sup>

Less than one week after the Commission issued its report, President Chirac delivered his response in a televised speech, quoted above, on December 17, 2003.<sup>180</sup> The President praised the Stasi Commission generously. He nevertheless adopted only half of one of its recommendations and either ignored or rejected the others. He proposed a law to ban conspicuous *religious* clothing (he said nothing about also banning *political* insignia as had been recommended).<sup>181</sup> The principal portion of the President’s speech consisted of praise for the glories of *laïcité*, after which he briefly announced his support for a law to ban conspicuous religious clothing. The President did not identify with specificity the logical connection between *laïcité* and the particular recommendation to ban religious clothing, almost as if the relationship were so obvious

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177. Commission chargée de mener une réflexion sur l’application du principe de laïcité dans la République, Décret No. 2003-607 of July 3, 2003, J.O., July 4, 2003, p. 11319. The official name, as specified in the decree, varies only slightly from that which the commission itself used, *la Commission de réflexion sur l’application du principe de la laïcité dans la République*.

178. RAPPORT AU PRESIDENT DE LA REPUBLIQUE [hereinafter STASI REPORT] (2003), <http://lesrapports.ladocumentationfrançaise.fr/BRP/034000725/0000.pdf> (last visited Mar. 10, 2004).

179. *Id.* at 68.

180. See Chirac, Elysée Palace Speech, *supra* note 18.

181. *Id.*

that it need not be explained. The media and a wide range of the French political spectrum praised the speech effusively for being tactful, nuanced, and balanced, without noting the fact that he ignored most of the Commission's recommendations or that he assumed rather than demonstrated the logic of the relationship between approving of *laïcité* and prohibiting headscarves. The French Parliament acted promptly. On February 10, 2004, the National Assembly adopted the law, followed on March 3 by the Senate. The law was signed by the President and Prime Minister on March 15, 2004.<sup>182</sup>

### *C. The Stasi Commission Report*

#### *1. The background and discussion of laïcité and the law*

The official decree creating the Stasi Commission provided it with the “responsibility of conducting an inquiry on the application of the principle of *laïcité* in the Republic and to make suitable proposals.”<sup>183</sup> This vague instruction said nothing about public schools, headscarves, or religious clothing. In a July 3, 2003, letter to the Commission’s chairman, President Chirac provided some additional guidance regarding his expectations by reaffirming the importance of the doctrine of *laïcité* to France and reiterating that French society respects the particularities of every religion.<sup>184</sup> Without referring to Islam directly, he made an unveiled reference to “communitarian” problems, and, without mentioning headscarves specifically, the President stated that “incidents” connected with the wearing of “religious insignia” (*insignes religieux*) had raised difficulties for employers and teachers. The President asked that the Commission provide him with an analysis of the issues, and he offered to make available state offices and resources for the Commission’s use. The official decree was thus drafted in very general terms, and the presidential letter was only somewhat more specific.

The members of the Stasi Commission, however, had no difficulty identifying the issue that was of foremost concern to the President, the media, and the public: headscarves in public schools.

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182. Law No. 2004-228, *supra* note 4.

183. Décret No. 2003-607, *supra* note 177, art. 1.

184. STASI REPORT, *supra* note 178, at 2–3.

The sixteen-member Commission, which included some distinguished scholars and officials,<sup>185</sup> acknowledged that the “public debate is centered on the wearing of the Islamic headscarf by young girls and more largely on the wearing of religious and political symbols at school.”<sup>186</sup> The Commission referred to the “headscarf affair” as “highlighted by the media” and also referred to how it had become “a symbol”<sup>187</sup> and an “explosive” issue.<sup>188</sup>

The Commission Report is presented in four parts: first, a general discussion of the principle of *laïcité* as a universal and republican value;<sup>189</sup> second, *laïcité* as a judicial concept;<sup>190</sup> third, challenges to *laïcité* in schools and the workplace;<sup>191</sup> and fourth, recommendations.<sup>192</sup> The Commission made several broad, positive, and constructive recommendations regarding religion, the state, diversity, and the promotion of the Arabic language and Islamic education.<sup>193</sup> Nevertheless, the portion of the report that predictably

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185. The members included, in addition to Bernard Stasi and the rapporteurs, Mohammed Arkoun, Jean Baubérot, Hanifa Chérifi, Jacqueline Costa-Lascoux, Régis Debray, Michel Delebarre, Nicole Guedj, Ghislaine Hudson, Gilles Kepel, Marceau Long, Nelly Olin, Henri Pena-Ruiz, Gaye Petek, Maurice Quenot, René Remond, Raymond Soubie, Alain Touraine, and Patrick Weil. I have great respect for many of the members of this Commission, who are among the leading scholars in their fields. It is surprising that such respected authorities could have adopted a document that falls so far below the quality of their individual work.

186. STASI REPORT, *supra* note 178, at 57.

187. *Id.* at 29.

188. The Commission noted that the *Conseil d’État* had “faced, for fifteen years, an explosive situation that the parliament did not want to handle.” *Id.* at 31.

189. *Id.* at 10–18.

190. *Id.* at 19–36.

191. *Id.* at 37–49.

192. *Id.* at 50–65. The Commission’s seventy-eight page final report referred to and identified approximately 200 witnesses who testified before them publicly, and acknowledged that some unidentified witnesses testified behind closed doors because of their fears of possible reprisals.

193. The Commission recommended, *inter alia*, that state schools should be available throughout France, which is not presently the case, *id.* at 39, 53; there should be more Muslim chaplains in hospitals, the military, and schools, *id.* at 39, 61, 64; there should be greater accommodation for the religious needs of the families of the deceased pertaining to burials, *id.* at 40, 65; a charter of *laïcité* should be drafted, *id.* at 50; there should be no separate reconsideration of the legal regime of Alsace-Moselle (where official French *laïcité* is *not* applied for historical reasons), *id.*; schools should provide better instruction on the values of republicanism and *laïcité*, *id.* at 51–52; there should be a “national priority” to combat discrimination in cities, *id.* at 52; Arabic language studies should be enhanced, *id.* at 54; there should be greater respect for diversity in education, *id.* at 55; the prohibition against state officials wearing religious clothing (described as “strict neutrality”) should continue, *id.* at 55–

captured media attention was its proposal that a law be enacted to prohibit the wearing of “conspicuous” religious and political attire in public schools.<sup>194</sup>

## 2. Laïcité, neutrality, equality, and freedom of conscience

The Stasi Commission describes *laïcité* in terms similar to those uttered by President Chirac and other political leaders (described in II.A. above). According to the Stasi Commission, “France has raised *laïcité* to the rank of a founding value.”<sup>195</sup> It is a “cornerstone” (*pierre angulaire*) of the republican pact.<sup>196</sup> “It is today the subject of widespread consensus: everyone accepts it.”<sup>197</sup> It is a “widely shared”<sup>198</sup> value or perhaps even “shared by everyone.”<sup>199</sup> This cornerstone is a product of French history. “To understand the history of *laïcité* is to understand the richness of its meanings.”<sup>200</sup> “*Laïcité* is a constitutive element of our collective history.”<sup>201</sup> It is the “fruit of history”<sup>202</sup> and it would be “dangerous”<sup>203</sup> if it were to fail. In addition to being a foundational value of the republic, it is

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56; teaching about religion should be improved, *id.* at 63; the state should encourage advanced studies on Islam, *id.* at 63; nonbelievers should have better access to broadcast media, *id.* at 64; religiously acceptable foods should be more readily available in schools, hospitals, and prisons, *id.* at 38–39, 64; and businesses and schools should better accommodate the wishes of believers to attend religious ceremonies, *id.* at 65. Some of these recommendations, such as promoting diversity in education, seem flatly contradictory to the Commission’s recommendation to ban religious clothing.

194. The report was unanimous on all of its recommendations, with only one exception, an abstention by the scholar Jean Baubérot regarding the ban on religious clothing.

195. STASI REPORT, *supra* note 178, at 9. This is repeated verbatim later in the report. *Id.* at 69.

196. *Id.* at 9.

197. *Id.*

198. *Id.* at 12.

199. *Id.*

200. *Id.* at 10.

201. *Id.* There is a brief recognition in the Stasi Report that *laïcité* sometimes caused conflicts, and the Civil Constitution of the Clergy is cited as an example. *Id.* at 10–11. For the Civil Constitution of the Clergy, see *supra* discussion accompanying note 55. The Stasi Report characterizes the nineteenth century as a struggle between two forms of *laïcité*: the combative model of Emile Combes, and the other that was more “liberal and tolerant,” *id.* at 11, of Aristide Briand, Jules Ferry, and Jean Jaurès. The more liberal and tolerant version identified by the Commission is the one that unilaterally prohibited congregations, revoked the Concordat of 1801, and nationalized church property, leaving the clergy without lands or salaries.

202. *Id.* at 50.

203. *Id.*

also a value that unites citizens in a common purpose. *Laïcité* “must allow the citizen to create a harmonious place in the shared public space. . . . [Laïcité] creates the possibility of reconciling lives in pluralism and diversity.”<sup>204</sup> It is a “conception of the common good.”<sup>205</sup> Its “cardinal principles” include respect, liberty, and living together.<sup>206</sup> “*Laïcité* can serve as the leaven of integration of everyone in society.”<sup>207</sup>

Finally, *laïcité* rests on three interconnected values: “liberty of conscience, equality of rights in spiritual and religious choices, and neutrality of political power.”<sup>208</sup> The Stasi Report repeatedly returns to these three values of neutrality (“neutrality of the state is the first condition of *laïcité*”),<sup>209</sup> equality (“neutrality and equality act as a pair”),<sup>210</sup> and freedom of conscience (“liberty of conscience” is a “judicial pillar” of *laïcité*, “especially with respect to freedom of worship.”)<sup>211</sup> The Commission also insisted that *laïcité* conforms to international law.<sup>212</sup>

### *3. The limitation of rights: “public order,” headscarves, and religious attire*

Under well-established French law, the state can limit the exercise of rights—such as wearing religious clothing—only when the restriction can be justified as promoting the “public order” (*l’ordre public*).<sup>213</sup> This public order doctrine refers to the “traditional

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204. *Id.* at 36. This is repeated verbatim later in the report, *id.* at 69.

205. *Id.* at 9.

206. *Id.* at 12.

207. *Id.* at 18.

208. *Id.* at 9.

209. *Id.* at 22. Neutrality is identified as a value of *laïcité*. *Id.*

210. *Id.* Equality is identified as a value of *laïcité*. *Id.* at 9, 13, 15, 36–39, 50–51, 66.

211. *Id.* at 23. Freedom of conscience is identified as a value of *laïcité*. *Id.* at 10–11, 14–16, 19, 22–29, 50, 58, 66.

212. *Id.* at 21.

213. For discussions of *l’ordre public*, as well as the interrelated concepts of the “general interest” and the rights and liberties of others, see ROBERT & DUFFAR, *supra* note 35, at 743–49 (discussing freedom of assembly); MESSNER, *supra* note 35, at 46, 451–52, 1099–1101.

The “public order” basis for limiting rights of religion and conscience is expressly provided in two fundamental laws: (1) article 10 of the Declaration of the Rights of Man of Aug. 26, 1789, which provides that “[n]o one may be disturbed on the basis of opinions, including religious opinions, provided that the manifestations do not interfere with the public order established by law”; and (2) article 1 of the Law on the Separation of Churches and the State of Dec. 9, 1905, *supra* note 82, which provides that the “[r]epublic guarantees freedom

function of government, permitting restrictions on individual liberty to be imposed so as to ‘maintain public security, tranquility, and health.’”<sup>214</sup> Thus the Stasi Commission, in recommending the prohibition on religious clothing in public schools, justified its recommendations in accordance with this doctrine: “The Commission, after having heard different points of view, finds that the question today is no longer liberty of conscience, but the maintenance of public order.”<sup>215</sup> The Stasi Report in fact referred to the public order more than two dozen times.<sup>216</sup>

The Stasi Commission justified its recommendation to ban religious attire on two specific public order grounds: (1) to respond to the coercion suffered by Muslim girls whose families and communities force them to wear headscarves against their will (and because such coercion exacerbates sexual discrimination and religious polarization within France); and (2) to respond to administrative difficulties suffered by school officials who are forced to implement confusing directives in situations of intense pressure.<sup>217</sup> The discussion below will focus on three specific issues arising from these public order justifications for recommending prohibition of religious attire in schools: (a) how fairly and accurately the Commission identified the reasons that Muslim girls wear headscarves to school;

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of conscience. It also guarantees the free exercise of religion under the sole restrictions that are specified in this law as being in the interest of public order.”

For discussion of the meaning of article 10 of the Declaration, see MESSNER, *supra* note 35, at 386–87; *see also* Declaration of the Rights of Man and Citizen of Aug. 26, 1789, art. 4 (“Liberty consists of being able to do whatever does not harm others; though the exercise of natural rights of each man must not limit the rights guaranteed to other members of society to enjoy the same rights. Such limits can only be determined by law.”).

214. BELL, *supra* note 80, at 83 (quoting LEON DUGUIT, *TRAITE DE DROIT CONSTITUTIONNEL* 728 (2d ed. 1923)). While American jurists might see public order as an unduly vague doctrine that is susceptible to manipulation and abuse, it is well respected and is an integral aspect of French law. French “public order” might be analogized to the common law doctrine of reasonableness. Although the two terms do not have an equivalent meaning, they are both traditional terms that are fully integrated and accepted legal discourse despite the fact that they are vague.

215. STASI REPORT, *supra* note 178, at 58.

216. *Id.* at 10–11, 14, 23, 25–26, 30, 40, 56–59. So, for example, “The *laïc* state must not remain indifferent, because troubles to the public order, coercion, threats, racist and discriminatory practices, which are justified on the basis of religious or spiritual arguments, undermine the foundations of the school.” *Id.* at 15. “In too many schools, the testimony has shown that the identity conflicts [between religions] can become a cause of violence, leading to attacks on individual liberties and provoking troubles to the public order.” *Id.* at 56–57.

217. *Id.* at 31.

(b) how clearly and objectively the Commission identified and described the scope of the problems faced by public school officials; and (c) how well the Commission explained the nexus between the problem of coercion on Muslim girls to wear headscarves and its recommendation to prohibit religious attire in schools.

*a. The explanation of why Muslim girls wear headscarves to school.* The Commission made the following statements to explain why Muslim girls wear headscarves:

Young men force them to wear enveloping and asexual clothing and to lower their gaze whenever they see a man; if they do not comply, they are stigmatized as “whores.”<sup>218</sup>

The headscarf is sometimes imposed on pre-adolescent girls by violence. Once they have put on the headscarf, they can enter into the staircases of apartment buildings and go into the public without fear of being conspicuous, even mistreated, as they were when their heads were uncovered. The headscarf thus offers, paradoxically, the protection that should have been guaranteed by the Republic.<sup>219</sup>

They appear as the “silent majority,” victims of pressure imposed by the family or community, the young women need to be protected . . .<sup>220</sup>

There are pressures placed on these young minor girls to force them to wear religious insignia. The family and social environment imposes a choice on them that is not their own. The Republic cannot remain deaf to the cry of distress of these young girls. The schools must be for them a place of liberty and emancipation.<sup>221</sup>

In only two sentences did the Commission even acknowledge the *possibility* that some Muslim girls might voluntarily choose to wear the headscarf, and even these two sentences minimize the seriousness of the possibility.<sup>222</sup> Thus the Commission clearly

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218. *Id.* at 46.

219. *Id.* at 47.

220. *Id.* at 58.

221. *Id.*

222. Some “young girls and women voluntarily wear the headscarf, but others wear it under constraint or pressure.” *Id.* at 47. Wearing the veil “could be a personal choice or, to the contrary, it could be under duress (*contrainte*), which is particularly intolerable for the youngest.” *Id.* at 57.

suggests that the overwhelming reason that headscarves are worn in France is due to unwarranted coercion on Muslim girls who are therefore victims of an oppressive community. But on what evidence did the Commission base these findings? There are three significant weaknesses in this regard.

(1) *Poor methodology in identifying the problem.* Having identified the public debate as being centered on young girls wearing the headscarf, the Commission presumably should have undertaken an inquiry to determine why headscarves are worn. We might have imagined that the Commission, using the extensive state resources that were placed at its disposal, would have conducted a serious inquiry to determine *why* Muslim girls wear the headscarf and then attempted to quantify the results. Such an inquiry could have been conducted using standard social-science techniques, such as in-depth interviews or other surveys, which would best assure that the girls were able to respond freely and accurately. We can easily imagine a wide variety of possible answers that might have been given to the question, “why do you wear the headscarf?”<sup>223</sup> A serious investigation of the issue might also have asked Muslim girls who do not wear the headscarf why they do not, as well as why their friends do. Further questions could be posed to those who have changed their minds, either from not wearing to wearing or vice versa. There are many tools available to social scientists to attempt to understand such issues—if they genuinely wish to know the answers.

The Stasi Commission, however, neither conducted its own scientific analysis of why French Muslim girls wear the headscarf nor reported that it had attempted to learn the answer through a conscientious review of the available social-science literature. This failure might be analogized to that of a hypothetical commission appointed to make recommendations on teenage smoking, but which neglected to provide any objective evidence about why teenagers smoke. The only evidence the Commission cites in support

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223. Among the variety of (nonmutually exclusive) possible responses: because I am forced to wear it by my brothers and father; for reasons of personal modesty; because it is commanded by the *Qur'an*; as a statement of solidarity with Islamists; as a protest against my father who is not a good Muslim; because it makes me feel part of a larger community; because I want to show solidarity for my sister who was attacked when she wore it; because it annoys the French; as a protest against the fashion that exploits the female body; as a way of telling men that I am not available sexually.

of its finding that coercion is the basis for wearing headscarves came from unnamed witnesses, some of whom were interviewed behind closed doors.<sup>224</sup>

It is, of course, possible that many Muslim girls in France are, as the Commission suggests, coerced into wearing headscarves. We can also imagine the very real possibility that some are threatened with bodily harm if they do not conform to family or community wishes. To the extent that this is happening, as it presumably is in at least some cases, the Commission is entirely justified in identifying it, explaining it, and condemning it. The Commission's weakness, however, was its failure to offer any systematic data or quantification to show the pervasiveness and gravity of the problem. Perhaps the dramatic closed-door cases that the Commission heard were completely true, but nevertheless quite rare. Perhaps they were representative examples of a widespread phenomenon. Perhaps they were typical phenomena in some communities, but completely absent in others. Answers to such questions could help inform a rational and nuanced analysis and help make effective recommendations. The Commission, however, relies solely on anecdotes offered in secret and on unattributed testimony.

(2) *Failure to take rights seriously.* The most conspicuous fault in the Commission Report was its failure to have taken seriously the rights of religion and conviction of those who wish to wear religious attire. The *Conseil d'État*, the highest relevant judicial authority, had decided that the French Constitution and international law give children "the right to express and to manifest religious beliefs inside the schools."<sup>225</sup> The Commission, however, never raises these constitutional rights as an issue that merited serious consideration.<sup>226</sup> Although the Commission cited sympathetically examples of Muslims who did not want to wear the headscarf, the girls who chose to wear headscarves were treated as if they were invisible or unworthy of being taken seriously. Nor did the Commission discuss the impact of their recommendation on the rights of Jews or Sikhs, the other religions that are most likely to be affected by a ban on

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224. STASI REPORT, *supra* note 178, at 47.

225. Avis du Conseil d'État No. 346893, *supra* note 19.

226. See *supra* note 222.

religious clothing for religious or cultural reasons.<sup>227</sup> One could imagine that a conscientious report could have considered fully the rights of conscience that were involved, but nevertheless concluded, with a thoughtful and nuanced explanation, that other interests ultimately have a more compelling justification. But the Stasi Commission, which devoted many pages of its report to expressing its admiration for the doctrine of *laïcité*, did *not devote even one sentence to describing or explaining the rights of conscience that might be infringed if its recommendation were to be implemented.*

In reality, the issues surrounding religious beliefs regarding the Islamic headscarf are extremely complex. Muslims have a wide-ranging and energetic debate about what Islam requires (or merely enjoins) regarding women wearing head coverings. Some believe that the headscarf is merely a cultural tradition that has nothing to do with Islam, while others believe that it is commanded by the *Qur'an*, supported by *ahadith*, and required by leading schools of Islamic jurisprudence and by important scholars for hundreds of years.<sup>228</sup> There are wide varieties of practice regarding the headscarf

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227. Nor, for that matter, did it even mention the consequences of its recommendation on clothing bearing political expression, which it also recommended prohibiting.

228. Opinions within the Muslim community vary widely regarding whether women are required or enjoined to wear the headscarf. The core of the religious debate typically centers on the interpretation of four verses (or *ayat*) from the *Qur'an* (24:30–31, 24:60, 33:59, and 33:53), as well as some *ahadith* (testimonies by witnesses about sayings or actions of the Prophet). The larger debate includes the historical and cultural varieties of the meaning of the terms used in the *Qur'an*: whether particular *Qur'anic* injunctions pertain to women generally or only the Prophet's wives, and whether men have used the covering of females as a means of retaining social control over women. While it is true that some fundamentalist Muslims have politicized the debate in insisting on wearing headscarves, some secular Muslims also have politicized the debate by arguing, incorrectly, that only fundamentalist Muslims advocate the headscarf.

The three Arabic words in the *Qur'an* that are most frequently invoked in modern discussions of headscarves are *hijab*, (sometimes transliterated as *hejab* in French), *jilbab*, and *khimar*. The Arabic word that contemporary European and American Muslims most often use to describe women's head coverings is *hijab*. The root of the word *hijab* appears seven times in the *Qur'an* (7:46, 33:53, 38:32, 41:5, 42:51, 17:45, and 19:17). The word *khumur* (singular *khimar*) appears at 24:30–31. The word *jilbab* appears at 33:59. There are other verses in the *Qur'an* pertaining to women's dress, but they speak of righteousness and modesty generally, without using specific words to describe particular items of clothing or coverings. See *Qur'an* 7:26. The passage that arguably is the most important is 24:30–31. Although many translations of the *Qur'an* use the word "veil" in this verse, the relevant Arabic word is *khumur*, which, arguably, refers to a "covering" wrapping the torso and does not refer to the head at all. Most scholars agree that verse 24:30–31 means, at a minimum, that all women must cover their breasts completely and that their breasts must not reveal any movement while women are walking or performing other activities. Although modern European and American

throughout the Muslim world, and practices have changed over time. This may be analogized to Christian attitudes toward the cross and the crucifix, which also have elicited dramatically different interpretations over time and among different Christian communities. Whereas some Catholics and Orthodox believe that the cross should be venerated, some Christians see devotion to the cross as superstitious or perhaps even idolatrous. Just as the headscarf can be manipulated by certain groups to send an ideological message, so can the cross be manipulated to send messages, whether by vigilantes in white hoods or crusaders in armor.

Secular state commissions presumably are not qualified to decide theological questions about what the cross should mean to Christians or what the headscarf should mean to Muslims. Disagreements about the meaning of symbols runs throughout all religions, and what some may believe to be sacred, others—including coreligionists—may see as superstitious. While the state presumably should not decide such matters, it nevertheless should respect—and protect—the right of its citizens to make their own judgments about such matters, just as the *Conseil d'État* had determined. The Stasi Commission, however, chose to apply a harsh interpretation of *laïcité* that reflects its confrontational past rather than its mythic values of neutrality, equality, and tolerance.

(3) *Inconsistency regarding coercion.* Because of its criticism of those who coerce Muslim girls to wear the headscarf, we might have imagined that the Commission would have taken a position of

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Muslims typically use *hijab* in the way “headscarf” has been used here, it is argued by some that in the relevant texts from the *Qur'an*, *hijab* actually refers to a curtain that Muhammad used to separate his wives from male visitors and is not a piece of clothing. Of the four principal schools of *Sunni* Islam, three conclude that women should cover their heads. Perhaps the leading *hadith* on this issue is from the scholar Abu-Dawud: “Aisha [wife of the Prophet] said: Asma, daughter of Abu Bakr, entered upon the Apostle of Allah (peace be upon him) wearing thin clothes. The Apostle of Allah (peace be upon him) turned his attention from her. He said: O Asma’, when a woman reaches the age of menstruation, it does not suit her that she displays her parts of body except this and this, and he pointed to her face and hands.” SUNAN ABU-DAWUD, Book XXXII, no. 4092, [http://www2.iiu.edu.my/deed/hadith/abudawood/027\\_sat.html](http://www2.iiu.edu.my/deed/hadith/abudawood/027_sat.html) (last visited May 15, 2004). This, however, is a weak *hadith* (i.e., *mursal*) as Abu-Dawud himself recognized, because there is no record of the person who transmitted it from Aisha. See ABD AL-HALIM ABOU CHOUQQA, 3 ENCYCLOPÉDIE DE LA FEMME EN ISLAM 63–66 (2000); see also DOUNIA BOUZAR & SAIDA KADA, L’UNE VOILÉE, L’AUTRE PAS (2003); MUSLIM WOMEN’S CHOICES: RELIGIOUS BELIEF AND SOCIAL REALITY 8–12 (Camillia Fawzi El-Solh & Judy Mabro eds., 1994); ANNE SOFIE ROALD, WOMEN IN ISLAM: THE WESTERN EXPERIENCE 254–94 (2001).

principled opposition to coercion in matters of conscience or even religious attire. A careful reading of the Stasi Report, however, reveals that the Commission is highly selective in its condemnation of coercion; indeed, the *only* form of coercion that the Commission Report specifically condemns is coercion that results in the wearing of religious head coverings. For example, the Commission never acknowledges the existence of the intense social pressure in France on Muslim girls *not to wear* headscarves. Schools have been attempting to ban them since 1989, leading French politicians have condemned them, and employers have pressured Muslim women not to wear headscarves. We also can imagine that some fathers pressure their teenage daughters *not to wear* the headscarf. The Commission never mentions, let alone condemns, such coercion by school teachers, administrators, policemen, or others.

The inconsistency in its objection to coercion is further displayed in the Commission's discussion of Jewish boys wearing the skullcap. The Stasi Report describes the threats to Jewish boys wearing the skullcap, suggesting that it believes that these threats are wrong.<sup>229</sup> Yet its proposed remedy is exactly the opposite of what it recommended for the Muslim girls. Whereas the Commission argued that the state had a responsibility to combat the pressure against girls who do not want to wear the headscarf, the Commission's recommendation was to accede to those who were harassing Jewish boys by giving the harassers exactly what they wanted: removal of Jewish skullcaps.

Thus, the Commission does not take a principled and consistent stand against coercion or threats in matters of conscience or belief. Its highly selective objection to coercion emerges only when coercion results in the wearing of the headscarf. Indeed, by recommending its own form of coercion—denial of state educational benefits to boys and girls who wish to wear religious head coverings—the Commission commits exactly the same offense that it freely condemned in others.

*b. The administrative problems in public schools.* The Stasi Commission asserts that religious symbols are “troubling” the peace in schools.<sup>230</sup> It suggests:

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229. STASI REPORT, *supra* note 178, at 48.

230. *Id.* at 41.

[F]or the school community as a whole, the wearing of the veil is too often a source of conflicts, of divisions, and even of suffering. The visible character of religious insignia is resented by many as contrary to the school's mission which should be a place of neutrality and a place for awakening critical awareness. It is also an affront to the principles and values of the school, especially in teaching equality between men and women.<sup>231</sup>

In addition to the disruptions of the peace in schools, the Stasi Commission also asserted that school administrators have been burdened by difficulties in understanding and applying the law as interpreted by the *Conseil d'État*. The Commission determined that in the fifteen years following the 1989 decision, it had become increasingly difficult for local officials to make their decisions on a "case-by-case" basis, particularly because they are "often isolated in a difficult environment."<sup>232</sup> In addition, the Commission recognized that it can be difficult for officials to understand where the lines should be drawn among religious symbols, as well as which actions impermissibly promote proselytism and which do not.<sup>233</sup> Some school officials have been in "disarray" due to the "heterogeneity" of these situations and the "pressures exerted by local forces."<sup>234</sup> Thus, the Commission is suggesting that local schools are in confusion due to conflicts and the difficulty of applying the guidance of the *Conseil d'État*. Once again, it is appropriate to ask: what *evidence* does the Commission offer to support its suggestions that peace has been disrupted in schools and that administrators are finding it difficult to understand the law?

We would have expected that a Commission whose members included some leading French social scientists would have begun its work by identifying with specificity the nature and the scope of the problem faced by public schools in France. We could have expected that the Commission would quantify answers to questions such as: How many Muslim girls are there in French public schools? How many in private religious schools? How many girls wear the headscarf in public schools? How many conflicts have been reported in schools attributable to the headscarf? In how many cases were the conflicts provoked by the girls who were wearing the headscarf? In how many

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231. *Id.* at 57.

232. *Id.* at 31.

233. *Id.*

234. *Id.* at 57.

cases were the conflicts provoked by others against the girls? Are there problems in private Catholic schools attended by Muslim girls wearing the headscarf? How many girls have been prohibited from entering school because of disruptions? To what extent have public school officials tried to mediate conflicts? What mediation attempts have succeeded and failed? Why? In how many cases did public school officials ignore the guidance of the *Conseil d'État* and attempt to prohibit the wearing of headscarves? In how many cases did conflicts arise as a result of school officials attempting to ban headscarves even though the *Conseil d'État* had guaranteed the right? These and comparable questions should have been raised and conscientiously answered by the Commission. Some of the evidence that is available to help answer these questions—evidence which the Commission did not cite—certainly suggests that the problems were not only much less serious than the Commission would have its readers believe, but that the problems were decreasing in seriousness.<sup>235</sup>

At the time the Stasi Commission was appointed, it will be recalled, no new dramatic or provocative cases regarding headscarves in the schools had come to the public's attention. As outlined above,<sup>236</sup> the *Haut Conseil à l'Integration* had found that the guidance offered by the *Conseil d'État* appeared to be working, a conclusion that was reaffirmed by the *Traité de droit de religion français*, and the Education Ministry's mediator had reported a fifty percent reduction in problematic cases. No new troubling incidents arising from schools led to the calling of the Stasi Commission. In fact, the crisis of 2003 seems to have arisen not from particular events, but from statements made by politicians that appealed to latent popular sentiments. When these political developments are

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235. For example, unofficial estimates, attributed to the Minister of the Interior and published by the French media, have reported that there are 1,256 girls in public schools who wear the headscarf. Of these, only twenty have been difficult cases, and only four girls have been expelled. LE MONDE, Dec. 10, 2003, LEXIS (reporting on estimates made by Interior Minister Sarkozy on November 20, 2003). Also, as described above, one very useful barometer of the source of the problems at the local level can be inferred from the judgments of the *Conseil d'État*. Of the forty-nine contested cases before it, forty-one were decided against school administrators and only eight against the students and their families, HAUT CONSEIL À L'INTÉGRATION, *supra* note 160, which certainly suggests that the provocateurs in most cases were not the Muslims but those who were prejudiced against them. Furthermore, as described in *supra* note 164, the relevant official from the Ministry of Education reported early in 2003 that the number of problematic cases had decreased by half. *See also supra* notes 161–63.

236. *See supra* text accompanying notes 160–161.

considered in conjunction with underlying attitudes that are revealed in public opinion polls, the first question that the Commission should presumably have addressed was whether there was in fact a serious problem caused by headscarves in public schools, or whether there was only an apparent crisis that had been precipitated by political figures pandering to popular prejudices. Nowhere does the Commission Report consider the possibility that the headscarf crisis of 2003 was due to a combination of popular prejudices, media sensationalism, and exploitation by the political classes.

We can of course feel sympathy for local officials who probably did feel many pressures with regard to the headscarf. But it must also be recognized that the Commission, once again, never specified *who* was placing pressure on local officials. The Stasi Report implies that the pressure is coming from Muslims—but it does not say so clearly. Of course we can assume that the sources of the pressure will likely vary from one community to another, and we can well imagine the possibility of beleaguered school officials feeling pressures from multiple directions at the same time. But keeping in mind that French law, at the time the Commission made its recommendations, *presumed that girls had the constitutional right to wear headscarves*, we can reasonably imagine that pressures came either from those who *opposed* the law as articulated by the *Conseil d'État* (and who impermissibly wished to ban headscarves), or from those who believed that the official policy was not being followed by school officials.<sup>237</sup> These scenarios suggest that *if there was undue pressure on local officials, it was probably coming from those who were seeking to*

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237. This may well be the case. See MESSNER, *supra* note 35, at 1135–36 (discussing the many efforts of national and local officials to circumvent the decisions of the *Conseil d'État*). For further evidence, see *supra* note 235. The Stasi Commission, which demonstrated great solicitude for the rights of French citizens who did not wish to wear headscarves, was completely silent on the rights of the French citizens who were repeatedly denied their right to wear them. Indeed, the Stasi Commission even implies that the wearing of headscarves—rather than the constitutional violations—were the important issue. From public opinion polls and social attitudes, it can well be imagined that the principal pressure on school officials came from those who did not want scarves being worn in school, regardless of the decision of the *Conseil d'État*. Of course this is to some extent speculative, and it is also probable that in some cases it was the proponents of the headscarves who were provocative. Nevertheless, when the Commission identified this issue as one basis for its recommendation, it should have specified with great clarity the source of the unwarranted pressure. Failing to do so suggests either a lack of intellectual rigor or an unwillingness to acknowledge popular prejudices against Muslims and the headscarf. Again we can contrast the Commission's criticism of those who pressure girls to wear the headscarf and its silence regarding those who apply pressure to prevent it.

*ban headscarves in violation of existing French law.* Once again, the Commission could have avoided the troubling vagueness of its assertions by accurately and objectively providing evidence to identify the sources of the pressure on public officials. By failing to identify exactly who was causing the pressure, the Stasi Commission leaves the reader with the (apparently incorrect) impression that the undue pressure on local officials came predominantly from those who favored headscarves, rather than from those who wished to ban them. It would indeed be a disservice to the rule of law if people were able to place inappropriate pressure on school officials to ignore the constitutional law articulated by the *Conseil d'État*, and then the Stasi Commission were to respond by recommending a change in the law to satisfy the very people who had acted against the law. This resembles, of course, the Commission's recommendation that Jewish boys remove their skullcaps to reduce tensions caused by those who dislike the sight of Jews wearing head coverings.

In addition to lamenting the pressures felt by local officials, the Stasi Commission also asserted that local officials have had difficulty applying the law as articulated by the *Conseil d'État*. But once again, the Commission failed to identify even one example where the law was unclear or confusing—certainly conveying the impression to the outside reader that the Commission was more interested in recommending the banning of headscarves than it was in providing an intellectually respectable analysis of the situation. The Commission relied ultimately not on facts and arguments, but on inference and innuendo—all in support of prohibiting children from making their own determinations about how they wish to honor their God.

*c. The nexus between undue social pressure to wear the headscarf and the recommendation to prohibit headscarves in schools.* Having emphasized the problem of coercion behind the wearing of the headscarf, the Commission recommended that religious and political attire be prohibited from public schools. The discussion above suggests that there were problems in how the Commission identified and analyzed the issue of coercion. Let us temporarily assume that the Commission was correct in identifying coercion against Muslim girls as a serious problem, and in believing that this coercion harms these girls by depriving them of full integration into the public schools, by reducing their freedom of choice, and by forcing them

into a sexist subcommunity where their rights as full human beings are not respected. How well does the Commission's recommendation, which would ban headscarves from public schools, respond to these problems?<sup>238</sup>

First, the Commission offers no evidence or argument that banning headscarves in schools will reduce coercion on girls at home or in their communities—which are the places that the Commission identified as the source of the coercion. Second, and probably more important, the Commission does not analyze or discuss the possible counterproductive consequences of its recommendations. For example, the fathers and brothers who force girls to wear headscarves may apply even greater pressure and insults on them. This is exactly the type of issue that a conscientious commission should have considered and examined thoroughly—but such analysis is completely lacking in the Stasi Report. If the Commission was concerned that the girls were called “whores” if they did not wear headscarves, why did it imagine that such insults will decrease if the girls are forbidden to wear headscarves in schools? Would they not be more likely to increase? What responses are likely to come from the communities that pressure girls into headscarves and seclusion once the girls cannot wear the headscarf at school? Will the girls be sent to Islamic schools, and thereby be further separated from the remainder of French society? Or will they perhaps be withdrawn from education altogether? If the community pressure on these girls is as intense as the Commission suggests, is not banning the headscarf likely to exacerbate the very ills that the Commission criticizes? And, on a more global basis, is it not possible that attempts to ban the headscarf may ultimately polarize the French population and raise even deeper antagonisms against Muslims and women wearing headscarves outside schools?

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238. It should be remembered that the Commission made many other recommendations, and it is possible that these other recommendations might have ameliorated some of the problems identified by the Commission. Thus, a defender of the Commission might respond by saying that the recommended clothing ban should not be considered in isolation and that it was never imagined to be the entire solution to the problem. Responses to such a defense, even ones that acknowledge its reasonableness, could be that the Commission knew that the headscarf was the issue of interest to the public and that this recommendation would likely be seized in exclusion of the others, and that the Commission nevertheless had the obligation to show that the ban would have positive results that would outweigh the negative consequences. Even if we grant the (hypothetical) defense its due, the Commission nevertheless did not attempt to address the nexus or the possible counterproductivity of its recommendation.

The Commission began its analysis by using effusive language praising *laïcité*, neutrality, equality, and freedom of conscience. Although underscoring the importance of rights of conscience, the Commission never troubled itself to identify exactly what rights of religion and belief were even implicated in the issue of religious clothing. Nowhere does the Commission acknowledge that some human beings attach great importance as matters of conscience to the wearing of religious clothing. And after failing to identify the right that was implicated, the Commission relied on the public order doctrine without having documented carefully the public order issue that was implicated. Thus, the Stasi Report does not objectively balance rights of conscience (which it never discusses as an issue of concern) against public order (which it fails to describe in any specific way). Rather, the Stasi Report uses the *rhetoric of laïcité* as a sword to justify the banning of religious clothing and insignia. We may predict, with confidence, that the future will show that the Stasi Report did not analyze a conflict; it exacerbated one.

#### V. “UNDER GOD,” RELIGIOUS FREEDOM, AND DISSENTING JUDGES IN THE NINTH CIRCUIT

Most Americans probably do not share the concerns of the National Assembly, President Chirac, and the Stasi Commission regarding religious attire in public schools. This does not mean, however, that Americans are in any way indifferent to the role religion plays in public schools. Americans link in their minds public schools, the American flag, national values, and the declaration that the United States is “one Nation under God.” Thus, public schools play a role in the United States similar to that of public schools in France.<sup>239</sup> “Americans expect schools not only to help students reach their potential as individuals but also to make them good citizens who will maintain the nation’s values and institutions . . . and pass them on to the next generation.”<sup>240</sup> Education “is at the core of the dominant American ideology.”<sup>241</sup> Of course, when schools are perceived as the locus of education for the next generation, they necessarily become a battleground where the values are defined. “In

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239. See *supra* discussion at IV.

240. JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 1–2 (2003).

241. *Id.* at 19.

the twentieth century, particularly in the United States, differing groups have battled to ensure that their concepts of politics, morality, and society are taught by the schools.”<sup>242</sup> It would probably be fair to say that during the last thirty years in the United States, the two most heated ongoing constitutional conflicts are the role of religion in public schools and abortion.<sup>243</sup> It is not surprising that the headscarf in France and “under God” in the United States can generate so much passion and anxiety: they are at the intersection of schools, values, religion, and national identity.

#### *A. The Background of the American Flag and the Pledge of Allegiance*

The flag of the United States is a pervasive symbol in national ceremonies, political campaigns, schools, public buildings (federal, state, and local), public parks, advertisements, sports activities, and on church properties, businesses, homes, motor vehicles, sweatshirts and lapels. Federal law establishes rules for proper care of and respect for the flag.<sup>244</sup> The American National Anthem is a song about the flag, and it too is codified, despite its questionable associations.<sup>245</sup> Since 1916, June 14 has been national Flag Day, which is now codified in law.<sup>246</sup> The official National March of the United States,

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242. JOEL SPRING, THE AMERICAN SCHOOL 406 (1997).

243. Popular rhetoric frequently claims that the “Supreme Court has taken prayers and the Bible out of school,” and some assert that a decline in American morals can be traced directly to the Supreme Court decisions of *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington v. Schempp*, 374 U.S. 203 (1963).

244. 4 U.S.C. §§ 1, 3, 5–9 (2004).

245. 36 U.S.C. § 301 (2004). “The Star Spangled Banner” was written by Francis Scott Key in 1814, but did not become the official National Anthem until 1931. The National Anthem, which was adopted in the middle of prohibition, was written to the tune of an eighteenth-century British drinking song that was popular in America at the time Key wrote the lyrics. The drinking song, “To Anacreon in Heaven,” was written in 1780 as the club song of the British Anacreontic Society, whose members were devoted to the cause of consuming vast quantities of food and wine. The song itself praises the gods Bacchus, Venus, and Apollo. Key’s patriotic words conclude:

And the Star Spangled Banner in Triumph shall wave  
O’er the land of the free and the home of the brave!

“To Anacreon in Heaven” concludes with:

And long may the Sons of ANACREON intwine  
The Myrtle of VENUS with BACCUS’S Vine.

Anacreon, to whose memory the song was dedicated, was a sixth-century B.C. poet whose verses praised wine and physical love (both homosexual and heterosexual). See THE OXFORD CLASSICAL DICTIONARY 79–80 (Simon Hornblower & Antony Spawforth eds., 3d ed. 1996).

246. 36 U.S.C. § 110 (2004).

the “Stars and Stripes Forever,” also is dedicated to the flag.<sup>247</sup> The most famous American monument from World War II, the Iwo Jima Memorial, commemorates the raising of the American flag on Mount Suribachi. The United States has a pledge of allegiance to a flag, which also is a federal law.<sup>248</sup> Public schools across the United States begin the school day with students and teachers jointly reciting the federal Pledge in accordance with state laws and policies.<sup>249</sup> In 1988, the Pledge of Allegiance became a subject of dispute in the presidential campaign when Republican candidate George H.W. Bush criticized Democratic nominee Michael Dukakis for having vetoed a Massachusetts Pledge of Allegiance law.<sup>250</sup>

Although the American flag is now a pervasive symbol inside the United States, this was not always the case. In fact, it is possible to specify with relative precision the ten-year period, from 1888 to 1898, when the flag moved from playing a modest background part on the national stage to filling the transcendent role that it plays today.<sup>251</sup> Prior to 1888, the flag typically appeared only on military bases, ships at sea, and some federal buildings.<sup>252</sup> But only one

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247. *Id.* § 304 (2004).

248. 4 U.S.C. § 4 (2004). For the text of the law, see *supra* note 7. The U.S. Code contains no requirements that schools lead children in reciting the Pledge—this being left to state law.

249. See, e.g., *infra* text accompanying note 312.

250. During the 1988 campaign, one journalist wrote:

“What is it about the Pledge of Allegiance that upsets [candidate Dukakis] so much?” Bush regularly asks in his stump speech, implying that perhaps Dukakis’ allegiance itself is suspect.

....

.... Bush will not say it openly, but he is sending the message that the Democrats and their standard-bearer are disloyal. If it was not having a significant effect on the electorate, the Bush campaign would not keep doing it.

William M. LeoGrande, *The Pledge Issue Is No Joke*, L.A. TIMES, Sept. 2, 1988, at 7.

251. The history of the United States flag of course goes back at least to the 1770s. It became a popular symbol in times of war, but generally faded during more peaceful periods. Between the Civil War and 1888 there had been a bout of enthusiasm in conjunction with the one-hundredth anniversary of the signing of the Declaration of Independence in 1876, and many mythic stories about the flag’s origin were widely circulated at the time in popular literature. See generally SCOT M. GUENTER, THE AMERICAN FLAG, 1777–1924: CULTURAL SHIFTS FROM CREATION TO CODIFICATION (1990). Terms that are often used to describe such attitudes are “the cult of the flag” and “flag mania”—which are sometimes embraced enthusiastically and sometimes rejected as pejoratives. *Id.* at 103, 111, 118, 124, 131.

252. Stuart McConnell, *Reading the Flag: A Reconsideration of the Patriotic Cults of the 1890s*, in BONDS OF AFFECTION: AMERICANS DEFINE THEIR PATRIOTISM 102–03, 107 (John Bodnar ed., 1996).

decade later, the American flag had become a ubiquitous symbol of the United States that was thoroughly integrated into American popular culture, commercial advertising, political campaigns, and patriotism. Whereas before 1888 flags were rarely displayed at public schools, by 1898 most schools had flagpoles and children started the school day by reciting a pledge of allegiance to the flag. In 1898, New York became the first of many states (later to be followed by the federal government) to enact laws prescribing flag rituals. The latter year also was notable for the first publication of John Philip Sousa's popular marching song "The Stars and Stripes Forever."<sup>253</sup> Of course, 1898 is also notable as the year that the United States launched its most blatant foray into international imperialism, which resulted in its flag being hoisted over Cuba, Hawaii, Wake Island, Guam, and the Philippines.<sup>254</sup> The year 1898 also heard the delivery

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253. The tune was written on Christmas Day, 1896. E.T. Paull's "We'll Stand by the Flag," another popular song and march, also was published in 1898.

254. New York's law requiring schools to establish flag ceremonies was enacted on March 28, 1898, the day before the United States issued an ultimatum to the Spanish government to terminate its presence in Cuba. GUENTER, *supra* note 251, at 229 n.45. Depending upon one's political and historical judgment, the history of the United States might be described as an almost uninterrupted continuation of imperialistic endeavors—from the conquest of Native Americans, to the Spanish in Florida, or to the Mexicans in Texas—until America's "manifest destiny" had reached the west coast. American conquests then continued, in this line of reasoning, to the Panama Canal, to Cuba, to Puerto Rico, and then finally to the Philippines and other Pacific islands. Such imperialism then sought outlets through the projection of global military and economic power. Though most Americans probably do not perceive the history of their land in such imperialistic terms, the one period where the United States in fact boasted unequivocally of its imperialistic ambitions and military power was during the 1890s, at exactly the same time of the dramatic increase in flag ceremonies and celebrations. Among the dozens of books on American imperialism during this period, two of the classics are WALTER LAFEBER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION 1860–1898 (1963) and ERNEST R. MAY, IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER (1973). The most influential book of the epoch was published in 1890. ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY 1660–1783 (1890). Mahan's subsequent book appeared in 1897. ALFRED THAYER MAHAN, THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE (1897).

For the circumstances leading up to the war, see MAY, *supra*, at 133–59. Much of the clergy and business community were opposed to the war. Those who most favored the war spoke in the language of jingoism and flag triumphalism. "Across the country, thousands gave themselves up to emotional excesses like those of tent-meeting revivals. Theater audiences cheered, stamped, and wept at the playing of the Star-Spangled Banner." *Id.* at 142. Some of the fervor was distinctly anti-Catholic. *Id.* at 142–43.

The war lasted only 100 days. On May 1, 1898, the U.S. Navy destroyed the Spanish fleet based in Manila Bay. On August 12, 1898, the United States ordered Spain to evacuate Cuba, cede Puerto Rico and Guam, and allow American occupation of Manila. On the same day it annexed Hawaii. Although the United States had ostensibly challenged Spain in the

of one of the most famous political speeches of the century—Senator Albert J. Beveridge’s “March of the Flag,” which praised the military conquests of that year and urged that the imperialistic spirit continue. “Fellow Americans, we are God’s chosen people. . . . His great purposes are revealed in the progress of the flag . . . .”<sup>255</sup>

There are several interrelated reasons why the “cult of the flag” developed in the decade leading up to the Spanish-American War. The first of the three factors was the active campaigning by civic societies in promoting the flag, with the most important being the Civil War veterans association, the Grand Army of the Republic (GAR). The GAR donated flags, proposed laws requiring the flying of flags above schools, and urged churches to fly the flag.<sup>256</sup>

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Philippines in order to support the indigenous rebels who had declared their independence, the United States ultimately decided that it would be best for the Filipinos if it were to take military control of all of the islands. When the rebels continued their struggle for independence, this time against the United States, troops were sent to crush the independence uprising. The United States agreed to Filipino independence only in 1935. The U.S. Naval Station at Guantanamo, Cuba, is a relic of this imperialistic era. Though the United States’ declaration of war had pledged it would not exercise sovereignty over Cuba, it imposed the so-called Platt Amendment on Cuban officials, who were forced to accept it as a condition of American military withdrawal from the island. In conjunction with the forced Platt Amendment, the two countries “agreed” to lease the Guantanamo station to the United States. To this day, the United States sends to Cuba a check for the nominal rent of the equivalent of 2,000 gold coins for the lease. The Cuban government does not recognize American *de jure* right and does not cash the check.

255. Albert J. Beveridge, *The March of the Flag*, in 14 THE LIBRARY OF ORATORY 426 (Chauncy M. Depew ed., 1902). “William McKinley plants the flag over the islands of the seas, outposts of commerce, citadels of national security, and the march of the flag goes on!” *Id.* at 438. “Ah! as our commerce spreads, the flag of liberty will circle the globe, and the highways of the ocean—carrying trade of all mankind, be guarded by the guns of the republic. And, as their thunders salute the flag, benighted peoples will know that the voice of Liberty is speaking, at last, for them.” *Id.* at 445. The rhetoric of Senator Beveridge echoes that of our own day. “Wherever we carry it, the American flag will stand not only for our power, but for freedom. (Applause.) Our nation’s cause has always been larger than our nation’s defense. We fight, as we always fight, for a just peace—a peace that favors human liberty.” George W. Bush, Remarks at Graduation Ceremony at West Point Military Academy, June 1, 2002, <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (last visited May 15, 2004).

256. See McConnell, *supra* note 252, at 102–19; GUENTER, *supra* note 251, at 104–07; ELLEN M. LITWICKI, AMERICA’S PUBLIC HOLIDAYS 1865–1920 177–80 (2000). Other organizations such as the Daughters of the American Revolution were engaged in similar activities. *Id.* 107–11; see also MARY R. DEARING, VETERANS IN POLITICS: THE STORY OF THE G.A.R. 405–07 (1952). The Grand Army of the Republic actively supported the efforts of Colonel Balch and *The Youth’s Companion*. *Id.* at 474–75; see also *infra* text accompanying notes 257–79. It also was during this period that the Grand Army of the Republic began its campaign, in conjunction with patriotic ceremonies, to include military instruction in public schools. *Id.* at 476–77; STUART McCONNELL, GLORIOUS CONTENTMENT: THE GRAND

The second stimulus sparking interest in the flag between 1888 and 1898 was a Civil War veteran, Colonel George T. Balch, who launched a program of patriotic rituals in public schools in New York City.<sup>257</sup> Colonel Balch, who shared prejudices against immigrants that were typical of the time, believed that a carefully prescribed flag ceremony could be useful in molding the minds of the tainted immigrants.<sup>258</sup> He prescribed elaborate flag rituals with exacting specification for flag sizes, the material of which they should be made, the wood for their staffs (e.g., "best white ash, oil polished" for primary schools), and decorative eagles to ride astride the poles.<sup>259</sup> He developed patriotic exercises for schools, including what is probably the first official salute and pledge. Balch wrote a patriotic catechism for students to memorize. The response to the question regarding "what do we mean by the salutation of the Flag?" was as follows:

Hence we have been taught to say—as we touch, first our foreheads, and next our hearts— "WE GIVE OUR HEADS!—AND OUR HEARTS!—TO GOD! AND OUR COUNTRY!" . . . [T]he American principles, the American language and the American Flag SHOULD BE SUPREME OVER ALL OTHERS, and so we complete our

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ARMY OF THE REPUBLIC, 1865–1900, at 230–31(1992); CECILIA ELIZABETH O'LEARY, TO DIE FOR: THE PARADOX OF AMERICAN PATRIOTISM 181–84 (1999).

257. For more regarding Balch, see GUENTER, *supra* note 251, at 114–20; LITWICKI, *supra* note 256, at 179; O'LEARY, *supra* note 256, at 151–55. While working as the auditor of New York City's public schools in 1888, Balch observed a teacher and students conducting a small patriotic ceremony in a classroom. In this small ceremony, he saw "the germ of a patriotic movement" that, if properly implemented, would have "far reaching consequences of which it would be impossible to prognosticate at this time." GEORGE T. BALCH, METHODS OF TEACHING PATRIOTISM IN THE PUBLIC SCHOOLS xii (1890) [hereinafter METHODS OF TEACHING]. Balch began giving speeches on the topic in 1889, published his book on it the following year, and spent the remainder of his life promoting the flag and patriotic exercises.

258. Balch apparently believed that immigrants had inherited subservient world views. He lamented American nineteenth-century policies that had allowed the immigration

of fifteen millions of aliens, speaking more than forty distinct languages and dialects other than the English; a vast number of whom bear in their physical and mental features the indelible impress of centuries of monarchical or aristocratic rule and oppression, and who have been trained to an implicit belief in and reverence for ecclesiastical institutions which find no place in our form of government [and which have] diluted our civilization.

METHODS OF TEACHING, *supra* note 257, at viii.

259. *Id.* at 39–41.

salute with the words, “ONE COUNTRY!—ONE LANGUAGE!—ONE FLAG!”<sup>260</sup>

Balch devoted the last five years of his life to promoting flag ceremonies in New York City schools—with the goal of establishing an “era of good feeling in the whole community.”<sup>261</sup>

The third, and probably the most influential effort to promote flags, salutes, and pledges in schools came from the popular publication *The Youth's Companion*.<sup>262</sup> By the late 1880s, this weekly, published in Boston, had been in existence for almost fifty years and had perhaps the highest circulation of any magazine in the United States, with a distribution approaching 500,000 copies per issue.<sup>263</sup> *The Youth's Companion* initially rejected the ritualized flag ceremonies promoted by Colonel Balch. Although not referring to him by name, it squarely targeted him in an August 29, 1889, editorial entitled “Teaching Patriotism” (the same title as Balch’s lecture and forthcoming book).<sup>264</sup> The editorial criticized the flag rituals advocated by the “gentleman of New York” because they were more appropriate for military posts and ships at sea than for children in school. Rather than following meaningless ceremonies, the magazine suggested that children would better appreciate their country by understanding its history. The youth are less captivated by ceremonies than historical examples “related in detail, with simplicity and truth.”<sup>265</sup> During the next few months, however, this initial editorial position would change dramatically.

*The Youth's Companion*, in addition to publishing adventure stories, poems, and amusing anecdotes, was also a pioneer in what later became the mail-order catalogue business.<sup>266</sup> It operated its own in-house Premium Department that offered a wide range of items as bonuses to people who enlisted new subscribers, but it also made the products available for direct purchase. A few years before Sears,

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260. GEORGE T. BALCH, PATRIOTIC PRIMER FOR THE LITTLE CITIZEN 16 (3d ed. rev. enlarged 1898).

261. METHODS OF TEACHING, *supra* note 257, at 43.

262. See GUENTER, *supra* note 251, at 114–32; JOHN W. BAER, THE PLEDGE OF ALLEGIANCE: A CENTENNIAL HISTORY, 1892–1992 (1992), <http://history.vineyard.net/pdgech0.htm> (last visited Mar. 1, 2004); LITWICKI, *supra* note 256, at 175–76; O’LEARY, *supra* note 256, at 155–71.

263. GUENTER, *supra* note 251, at 120; BAER, *supra* note 262, ch. 2.

264. THE YOUTH'S COMPANION, Aug. 29, 1889, at 429.

265. *Id.*

266. See GUENTER, *supra* note 251, at 125; O’LEARY, *supra* note 256, at 155–57.

Roebuck and Company issued its first catalogue in 1893, the Premium Department was already in the business of advertising and selling books, clothing, stamp albums, microscopes, toys, pocket knives—and American flags. In 1888, the enterprising head of the Premium Department, James B. Upham, had the innovative idea to promote simultaneously American patriotism and magazine profits. In that year, the Premium Department launched its “School Flag Movement,” which ultimately became a campaign to place flags in every public school in the United States—flags that the Premium Department was pleased to sell to schools and individuals.<sup>267</sup> In January 1890, it launched a nationwide essay competition for students to write about the flag.<sup>268</sup> *The Youth’s Companion* promised to donate a flag to the school of the winner of the competition in each state. The July fourth issue in 1890 was entitled “Raising the School House Flag,” and it included drawings, poems, essays, and the names of the winners of the competition.<sup>269</sup> The magazine sponsored additional competitions, published articles on poems on the flag, distributed poems that could be framed, and launched campaigns to stimulate both purchases and patriotism by sending to schools packets of “100 certificates” that students could sell to people in the community.<sup>270</sup> After 100 certificates had been sold for ten cents each, the ten-dollar purchase price was to be forwarded to the Premium Department, which would, in turn, send a flag to the school. The school would receive a flag, the people in the community would have a small certificate noting their patriotic contribution, and the magazine would make a profit. This entrepreneurial patriotism was wildly successful, with the magazine ultimately taking credit for sending more than 26,000 flags to schools.<sup>271</sup>

Whereas the magazine had previously asserted that Colonel Balch’s military-style flag ritualism was inappropriate for schoolchildren rather than the preferred patriotic education and cultivation of feelings, the magazine reversed course and wholeheartedly embraced flag ceremonies, saluting, and pledges. The pinnacle of the effort to formalize flag ceremonies came in 1892.

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267. BAER, *supra* note 262, ch 2.

268. THE YOUTH’S COMPANION, Jan. 9, 1890, at 31.

269. THE YOUTH’S COMPANION, July 3, 1890.

270. BAER, *supra* note 262, ch 2; GUENTER, *supra* note 251, at 122–23.

271. BAER, *supra* note 262, ch. 2; GUENTER, *supra* note 251, at 129–30.

The magazine engaged in a year-long effort to sponsor a nationwide flag ceremony to coincide with the opening of the Chicago world's fair—the Columbian Exposition of 1892.<sup>272</sup> The Premium Department appointed a staff writer, Francis Bellamy, to assume responsibility for promoting the event. The latter, formerly a Baptist preacher, was a Christian Socialist and the cousin of the soon-to-be famous utopian writer, Edward Bellamy.<sup>273</sup> Francis was able to obtain endorsements from President Benjamin Harrison and his Democratic challenger, Grover Cleveland. Bellamy's home-state senator, Henry Cabot Lodge, arranged for a meeting with President Harrison that resulted in a presidential proclamation endorsing the Columbus Day activity. A fiercely divided Congress united for the bipartisan purpose of making Columbus Day a national holiday.<sup>274</sup> The September 8, 1892, issue of *The Youth's Companion* included the outline of "The Official Programme" for the combined national ceremonies that would start precisely at 9:00 a.m. in Chicago and in schools throughout the country.<sup>275</sup> The third item on the agenda was a "salute to the flag," which contains the first version of what would later become the official Pledge of Allegiance.

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272. GUENTER, *supra* note 251, at 124–31; O'LEARY, *supra* note 256, at 161–71. The exposition, with exhibits from countries throughout the world, commemorated the 400th anniversary of the arrival of Christopher Columbus in the Western hemisphere.

273. For more regarding Bellamy's Christian Socialist background and his patriotism work at *The Youth's Companion*, see BAER, *supra* note 262, ch. 4. Bellamy had been a Baptist preacher for eleven years before he was forced to resign for having unorthodox theological views. He was then hired by *The Youth's Companion*. O'LEARY, *supra* note 256, at 157.

274. LITWICKI, *supra* note 256, at 175; O'LEARY, *supra* note 256, at 165. After trumpeting their presidential and congressional endorsements, the magazine attempted to explain the rationale for tying Christopher Columbus to a ceremony celebrating the United States flag in schoolhouses across the country. In what may be taken as not altogether compelling logic, the magazine explained:

Columbus stood in his age as the pioneer of progress and enlightenment. The system of universal education is, in our age, the most prominent and salutary feature of the spirit of enlightenment, and it is particularly appropriate that the schools be made the centre of the day's demonstration. To Americans, therefore, it seems logical and proper that the celebration of the discovery which made our republic possible should centre about the schoolhouse flag.

THE YOUTH'S COMPANION, Aug. 18, 1892, at 412. Whether or not the connection between Columbus, public schools, and the American flag is obvious to the modern reader, it seems to have been taken at face value in the 1890s. See O'LEARY, *supra* note 256, at 166.

275. This issue also advertised the sale of the full four-page program, including the speeches, which could be purchased in bulk quantities directly from the magazine.

At a signal from the Principal the pupils, in ordered ranks, hands to the side, face the Flag. Another signal is given; every pupil gives the Flag the military salute—right hand lifted, palm downward, to a line with their forehead and close to it. Standing thus, all repeat together, slowly: “I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for All.” At the words “to my Flag,” the right hand is extended gracefully, palm upward, towards the Flag—and remains in this gesture till the end of the affirmation.<sup>276</sup>

In addition to launching the Pledge, these instructions also launched the straight-arm salute that had been made famous in the French Revolution and that would be the preferred means for children to salute the flag through at least the 1930s.<sup>277</sup> The Columbus Day celebration was wildly successful. Almost every governor in the United States endorsed the day’s activities and more than half of the public schools in the United States promised to participate—meaning that millions of children participated in what was at that point the largest national ceremony in the history of the United States.<sup>278</sup> In New York City alone, 10,500 pupils participated in a

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276. THE YOUTH'S COMPANION, Sept. 8, 1892, at 446.

277. By promoting the straight-arm gesture (though palm up), *The Youth's Companion* used essentially the same gesture as that popularized by David and the French revolutionaries a century earlier. *See supra* note 53 (discussing David and the two oath artworks). By 1899, the Grand Army of the Republic endorsed *The Youth's Companion* straight-arm salute, along with both its pledge and that of Colonel Balch. DEARING, *supra* note 256, at 475. For the next fifty years, children throughout the United States pledged allegiance to the flag using the straight-arm gesture. By the early 1940s, as Americans became increasingly uncomfortable with its resemblance to the Nazi straight-arm salute, it was abandoned in favor of a bent-arm with the right hand placed over the heart.

As discussed above, *see supra* text accompanying notes 135 and 136, the Jehovah's Witnesses objected to state policies mandating recitation of the Pledge by schoolchildren, and suffered the consequences of popular violence against their religious beliefs. The Supreme Court noted in a Jehovah's Witness case that whereas West Virginia school officials had accommodated objections by some parents to the stiff-arm salute because it was “too much like Hitler's,” W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 627 (1943), they made no comparable effort to accommodate Jehovah's Witnesses' religious objections to pledging allegiance to a flag before expelling them. *Id.* The National Headquarters of the United States Flag Association unsuccessfully argued that the stiff-arm salute was not like Hitler's because the American salute had the palm up whereas Hitler's was palm down. *Id.* at n.3. Later efforts were instigated to revive the straight-arm gesture. The Senate adopted an amendment to the Pledge of Allegiance law in 1954 that would have returned the straight-arm salute, but Congress ultimately adopted the House version, which opted for the placement of the hand over the heart. *See also* GUENTER, *supra* note 251, at 119.

278. O'LEARY, *supra* note 256, at 167–68.

march commemorating the day.<sup>279</sup> Shortly after the Columbian Exposition, *The Youth's Companion* began to advocate the enactment of state laws mandating flag ceremonies at schools and became a national clearinghouse for legislation on flag laws.<sup>280</sup> The first statute was adopted by the state of New York in 1898, and legislatures and school boards joined the bandwagon during the following years.<sup>281</sup>

In the United States, as was the case in France during the Revolution, it was the people who had conscientious scruples against pledges and oaths who first felt the brunt of state measures to require declarations of loyalty and who ultimately became the victims of popular violence that punished those who refused. "Religious opposition to the flag-salute ceremony probably is as old as the ceremony itself."<sup>282</sup> As early as 1918, small religious groups that opposed pledging allegiance to the flag became the victims of both legal and extra-legal attacks. Some Mennonites, Jehovahites, members of the Elijah Voice Society, and members of the Church of God refused to comply with the Pledge because they believed it was idolatrous. They felt the force of popular opposition and the law.<sup>283</sup> The records of the attacks against these groups were not fully documented in part because there were few legal remedies available. There was no effective federal law or recognized constitutional right that could be used to obtain protection either against state officials for prosecuting religious dissenters or for failing to protect religious dissenters against mob violence.<sup>284</sup>

The group that suffered most famously for its conscientious objection to pledging the flag was the Jehovah's Witnesses. They suffered harassment for refusing to pledge throughout the 1930s.<sup>285</sup> The Civil Rights Section of the Justice Department, shortly after coming into existence in 1939, started keeping records on

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279. See DEARING, *supra* note 256, at 407.

280. GUENTER, *supra* note 251, at 124; see also BAER, *supra* note 262, at ch. 2.

281. For further discussion of the subsequent development of flag laws, see DAVID R. MANWARING, RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY 3–5 (1962).

282. *Id.* at 11.

283. *Id.* at 15.

284. Federal criminal statutes at the time, 18 U.S.C. §§ 51–52, were not effective in part because they protected only recognized federal constitutional rights. The Free Exercise Clause of the First Amendment was not incorporated until 1940 in the *Cantwell v. Connecticut* decision, 310 U.S. 296 (1940). The Civil Rights Act of 1964 was still far in the future.

285. MANWARING, *supra* note 281, *passim*.

harassment against Jehovah's Witnesses. David Manwaring, who was provided access to the Justice Department files, describes dozens of the attacks. On June 1, 1940, seventy Witnesses were taken into "protective custody" by the Odessa, Texas, police to prevent them from being attacked by a crowd. The prisoners were questioned throughout the night about their unwillingness to say the Pledge. The next morning "all seventy were turned over to a mob of over a thousand who chased and stoned them five miles down the railroad right of way."<sup>286</sup> Shortly thereafter, the Supreme Court handed down the *Gobitis* decision, which held that the federal Constitution provided no religious freedom right to prevent state officials from expelling students who refused to recite the patriotic Pledge.<sup>287</sup> Following that decision, a wave of violence against the Witnesses occurred throughout the United States. The number of attacks was so serious that the chief of the civil rights section of the Department of Justice, Victor W. Rotnem, published an article to draw attention to the problem. "In the two years following the [*Gobitis*] decision, the files of the Department of Justice reflect an uninterrupted record of violence and persecution of the [Jehovah's] Witnesses. Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts."<sup>288</sup> The people committing these violent acts, Rotnem reported, did so to manifest their patriotism and support of the cherished American flag. "The flag has been used in a manner bordering on immorality by mobs which have bated groups of Jehovah's Witnesses throughout the country."<sup>289</sup> When people saw Jehovah's Witnesses on the streets, they would demand that they recite the patriotic Pledge. Violence often followed the refusal.

The most spectacular early outbreak occurred in York County, Maine. Two Witnesses were beaten in Sanford on June 8, when they refused to salute. The following day, in Kennebunk, a carload of men conveniently equipped with throwing-size rocks "just happened to stop" in front of the Jehovah's Witness Kingdom Hall . . . . The Witnesses, already jittery from a fortnight of tension, greeted the visitors with shotgun fire, seriously wounding one. Six

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286. *Id.* at 164.

287. See *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

288. Victor W. Rotnem & F.G. Folson, Jr., *Recent Restrictions Upon Religious Liberty*, 36 AM. POL. SCI. REV. 1053, 1062 (1942).

289. *Id.*

Witnesses were arrested for attempted murder. In the meantime, an enraged mob of 2,500, failing to reach the prisoners, sacked and burned the Kingdom Hall, then drifted over to Biddeford to attack houses suspected of containing Witnesses.<sup>290</sup>

Absurd rumors began to circulate in the United States that Jehovah's Witnesses had pictures of Adolf Hitler in their homes and Kingdom Halls. Though Jehovah's Witnesses were in fact being persecuted in Nazi Germany for their refusal to pledge loyalty to Hitler, this seems to have escaped the notice of the patriotic crowds who persecuted them for refusing to pledge loyalty to the flag.

Other violence followed thick and fast. On June 16, the whole adult population of Litchfield, Illinois, turned out to attack sixty Jehovah's Witnesses. Litchfield police, unable to control the mob, put the Witnesses in jail, then called in the state police to protect the jail. Of the Witnesses' nineteen cars, sixteen were over turned and three driven into the city reservoir.<sup>291</sup>

In Nebraska, a Jehovah's Witness was pulled from his house and castrated.<sup>292</sup> In Little Rock, Arkansas, a group of workers armed "with guns, pipes and screwdrivers . . . mercilessly beat all the Witnesses they could find"; two Witnesses were shot and four others hospitalized.<sup>293</sup> All too often, police and other officials supported the mobs rather than the victims.<sup>294</sup> Just as laws and violence in France punished nonjuring priests during the French Revolution, laws and popular violence in the United States punished nonpledging Jehovah's Witnesses.<sup>295</sup> Violence became an extralegal punishment for those whose convictions did not permit them to make the patriotic gesture. Fortunately, much of the violence against the Witnesses declined after the *Barnette* decision of 1943—which spoke generously of rights of conscience and the right not to pledge allegiance to the flag.

The rise of the flag as the dominant national symbol thus began with enthusiastic patriotic sentiments, but was quickly transformed

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290. MANWARING, *supra* note 281, at 164–65.

291. *Id.* at 165.

292. *Id.*

293. *Id.* at 165–66.

294. *Id.*

295. It was not until the *Barnette* decision that states were prevented from punishing those who refused to pledge. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

into formalized ceremonies, followed by legal codification. Those who had religious scruples against reciting the words in unison while making the straight-arm salute were branded as unpatriotic. Children were expelled from schools, and adults were arrested and physically attacked by mobs.

So what could be more American than adopting a pledge to a flag that was written by a Christian Socialist, repeated while making the straight-arm loyalty salute (revived by French revolutionaries), and enforced by laws and popular violence? The answer, of course, is adding “God” to the mixture.<sup>296</sup> Following World War II, Americans became increasingly anxious about godless communism behind the iron curtain that had descended across Europe. The fall of Nationalist China to the Communists in 1949, and the uncovering of traitors in the early 1950s, increased the fears of the spread of communism. The author of the first bill to add “under God” to the Pledge of Allegiance, in arguing for an amendment to the law, declared:

Free nations today battle for their very existence in many parts of the world. Communism with its siren voice of false appeal is heard round the world and many peoples and many nations fall prey to those false headlights on the shores of time. One thing separates free peoples of the Western World from the rabid Communist, and this one thing is a belief in God.<sup>297</sup>

In 1950, Joseph McCarthy launched his famous campaign against Communist infiltration of the United States government. The following year, the Knights of Columbus, the conservative Catholic lay organization that supported McCarthy, began a campaign to insert the words “under God” in the official Pledge of Allegiance.<sup>298</sup>

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296. For earlier attempts to declare that the United States was not merely “under God,” but in fact “a Christian nation,” see GAINES M. FOSTER, *A CHRISTIAN NATION: SIGNS OF A COVENANT IN BONDS OF AFFECTION: AMERICANS DEFINE THEIR PATRIOTISM* 120–38 (John Bodnar ed., 1996); ROBERT T. HANDY, *UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA 1880–1920*, at 10–15 (1991). For descriptions of how the words “under God” were added to the pledge, see MARTIN E. MARTY, *3 MODERN AMERICAN RELIGION* 298–301 (1996); MARK SILK, *SPIRITUAL POLITICS: RELIGION AND AMERICA SINCE WORLD WAR II*, at 97 (1988).

297. 100 CONG. REC. H7758 (1954) (statement of Rep. Rabaut, the sponsor of the first bill in the eighty-third Congress to add “under God” to the Pledge).

298. Senator Joseph McCarthy was a member of the Knights of Columbus. Father Donald Crosby, S.J., refers to the Knights of Columbus and the Catholic War Veterans as “two of the staunchest pro-McCarthy groups in American Catholicism.” DONALD F. CROSBY,

Following the Knights' campaign, the next decisive boost came on February 8, 1954, in a Sunday sermon delivered by the Reverend Joseph Docherty to a congregation that included President Dwight Eisenhower. Docherty lamented that the American Pledge of Allegiance, as it was then formulated, had nothing specifically *American* in it and could be recited verbatim by little "Muscovites." But if the words "one Nation *under God*" were part of the Pledge, it would illustrate how the United States differed from its Soviet foe. President Eisenhower praised the sermon and immediately agreed that it would be a good idea to make the addition. Several bills were introduced immediately afterward.<sup>299</sup>

At exactly the same time that the congressional debates regarding God and the Pledge were taking place, Senator McCarthy, as chairman of the Senate Committee on Government Operations, was conducting hearings regarding the infiltration of Communists in the Army.<sup>300</sup> Concurrently, the public began a letter-writing campaign to Congress, not on the dangers of Communist spies or the abuses of civil liberties, but on adding "under God" to the Pledge. Congressman O'Hara of Illinois, for example, noted that he had received between 2,000 and 3,000 letters in support of the addition. "It was by far the largest mail that I have received on any subject during the months of the 83rd Congress. It reflected a spiritual awakening in our country the universality and the depth of which may never have been surpassed."<sup>301</sup> There was an "avalanche" of mail in support of the pledge. "At the very moment when Senator McCarthy's assault on the U.S. Army was grabbing the headlines and

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GOD, CHURCH, AND FLAG: SENATOR JOSEPH R. McCARTHY AND THE CATHOLIC CHURCH, 1950–1957, 221 (1978). Crosby notes that the Knights continued their support for McCarthy even after his death, at a time when most Americans had come to regard him as a bully. *Id.* at 222–23. The Knights' official publication, *Columbia*, praised McCarthy—both in life and after his death—and denounced his critics. *Id.* at 223; see also CHRISTOPHER J. KAUFFMAN, FAITH AND FRATERNALISM: THE HISTORY OF THE KNIGHTS OF COLUMBUS 380–85 (rev. ed. 1992). Kauffman, who is more sympathetic to the Knights than Father Crosby, nevertheless notes that "articles in *Columbia* and resolutions of the Supreme Council indicate the Knights' support of McCarthy's Senate hearings, and their defense of him against his detractors." CHRISTOPHER J. KAUFFMAN, PATRIOTISM AND FRATERNALISM IN THE KNIGHTS OF COLUMBUS: A HISTORY OF THE FOURTH DEGREE 111 (2001).

299. One bill, by Congressman Rabaut, had actually been introduced earlier in the Congressional session. 100 CONG. REC. H7758 (1954) (statement by Rep. Rabaut).

300. McCarthy never found a Communist spy. TED MORGAN, REDS: McCARTHYISM IN TWENTIETH-CENTURY AMERICA 448, 465, 508 (2003).

301. 100 CONG. REC. S7761 (1954).

filling the television screens, the issue that seemed to touch Americans most closely was the inclusion of God in the Pledge of Allegiance.”<sup>302</sup>

The short Senate Report on the proposed law, whose length was less than two-thirds of a page of the Congressional Record, consisted almost entirely of a letter written by Senator Homer Ferguson. The Senate Report (i.e., the Ferguson letter) asserted that “one of the greatest differences between the free world and the Communists [is] a belief in God,” and thus adding the two words to the Pledge “will enable us to strike a blow against those who would enslave us.”<sup>303</sup> The House Report, which also asserted that the United States would be more secure against its enemies if it added “under God” to the Pledge,<sup>304</sup> offered an additional religious justification:

Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.<sup>305</sup>

Congressman Rabaut, the chief sponsor in the House of Representatives, testified that the two-word addition would help the American people “be more alerted to the true meaning of our country and its form of government.”<sup>306</sup> Congressman O’Hara declared that “what we are engaged in today is a sacred mission.”<sup>307</sup> Democratic Congressman Peter Rodino appealed to the Christian military tradition: “Since the days of Constantine and his standard, ‘In this sign thou shalt conquer,’ nations and governments have relied for their strength on trust in God, and, in peace and war, have placed their confidence in a resolution to do His will.”<sup>308</sup> Although both the Senate and House Reports cite the Mayflower Compact as the earliest example of a divinely led America, their modern

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302. SILK, *supra* note 296, at 97.

303. S. REP. NO. 83-1287 (1954), reprinted in 100 CONG. REC. 6348.

304. H.R. REP. NO. 83-1693 (1954), reprinted in 1954 U.S.C.C.A.N 2339.

305. *Id.* at 2340.

306. *Id.* at 2341.

307. 100 CONG. REC. 7762 (1954).

308. 100 CONG. REC. 7763 (1954).

understanding of religion was not the prophetic religion of the Puritans where God calls the people to repentance, but a self-satisfied religion that linked flag, country, Constitution, people, God, and pledge: “Since our flag is symbolic of our nation, its constitutional government and the morality of our people, the committee believes it most appropriate that the concept of God be included in the recitations of the pledge of allegiance to the flag.”<sup>309</sup> President Eisenhower said, in his signing statement:

From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our nation and our people to the Almighty. *To anyone who truly loves America, nothing could be more inspiring* than to contemplate this rededication of our youth, on each school morning, to our country’s true heritage.<sup>310</sup>

Thus the flag, the Pledge, God, and country had all been united—and those who truly loved America would connect all in their minds. Following the legislative enactment, several members of Congress went outside to the Capitol steps and pledged allegiance to “one Nation under God” while CBS broadcast the event on television.<sup>311</sup>

#### *B. The Newdow Case and the Ninth Circuit Dissenters*

In March 2000, Michael Newdow, a medical doctor and the father of a public school student in California, filed a lawsuit in federal court in California alleging that the reference in the Pledge of Allegiance to “under God,” as well as California law requiring teachers to lead the recitation of the Pledge in public schools,

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309. *Id.* Will Herberg, writing in 1960, suggested that religion, as American citizens understand it,

is not something that makes for humility or the uneasy conscience; it is something that reassures him about the essential rightness of everything American, his nation, his culture, and himself; something that validates his goals and his ideals instead of calling them into question; something that enhances his self-regard instead of challenging it; something that feeds his self-sufficiency instead of shattering it; something that offers him salvation on easy terms instead of demanding repentance and a “broken heart.”

WILL HERBERG, PROTESTANT — CATHOLIC — JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 269 (new ed. rev. 1960).

310. 100 CONG. REC. 8618 (1954) (signing statement by President Eisenhower) (emphasis added).

311. SILK, *supra* note 296, at 98.

violates the U.S. Constitution.<sup>312</sup> As noted at the beginning of this Article,<sup>313</sup> a divided panel of the Ninth Circuit (*Newdow I*) held that the phrase “under God” in the federal Pledge violated the Establishment Clause, as did the California practice of leading schoolchildren in reciting the Pledge. The response to the decision was immediate and harsh. President Bush called the decision “ridiculous,”<sup>314</sup> and the Senate Majority Leader called it “nuts.”<sup>315</sup> Senator Byrd, who prides himself on being the Senate’s constitutional authority, said that a judge making such a decision is “stupid” and should be “blackballed.”<sup>316</sup> Senator Hillary Rodham Clinton was “surprised and offended” by the decision, and accused the Ninth Circuit panel of having “sought to undermine one of the bedrock values of our democracy, that we are indeed ‘one nation

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312. The discussion below does not attempt to discuss many of the important constitutional issues that are relevant for determining whether “under God” violates the Constitution. For articles discussing a broader range of constitutional issues, see Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41 (2004) (advocating the inclusion of the phrase “under God” in the Pledge of Allegiance primarily as a recognition of inalienable rights and limited government rather than a profession of religious belief); Derek H. Davis, *The Pledge of Allegiance and American Values*, 45 J. CHURCH & ST. 657 (2003) (examining the facts of the *Newdow* case, the history of the Pledge, and its “place in defining the religious aspects of the American public philosophy”); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996) (questioning the constitutionality of religious expression in public ceremonies and images); Alan E. Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 TEMP. L. REV. 281 (2003) (arguing that even if a government action is not demonstrably harmful to the relations of church and state, it may still be unconstitutional if it fails to “do good” in advancing the Establishment Clause’s goal of creating an inclusive and tolerant society); Steven G. Gey, “Under God,” *The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865 (2003) (considering the nature of trivial claims in the constitutional context and concluding that the inclusion of the phrase “under God” in the Pledge is not trivial and is unconstitutional); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995) (analyzing the constitutionality of teacher-led recitation of the Pledge of Allegiance in schools in light of the prohibition on teacher-led prayer in schools set forth in *Lee v. Weisman*, 505 U.S. 577 (1992)); Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986) (advocating the elimination of all references to God in official speech); Steven D. Smith, *Barnette’s Big Blunder*, 78 CHI.-KENT L. REV. 625 (2003) (arguing that the government is not prohibited from prescribing language such as “under God”).

313. See *supra* discussion accompanying note 7.

314. Press Release, White House, White House Reaction to Circuit Court Ruling (June 26, 2002), <http://www.whitehouse.gov/news/releases/2002/06/20020626-8.html> (last visited Mar. 1, 2004).

315. 148 CONG. REC. S6102 (daily ed. June 26, 2002) (statement of Sen. Daschle).

316. *Id.* at S6103 (statement of Sen. Byrd).

under God,’ as embodied in the Pledge of Allegiance.”<sup>317</sup> Catching the spirit of the times, Congressman Miller said that Congress must “respond to this outrageous decision and proclaim that these United States are united against terrorism, united against this decision, and united under God.”<sup>318</sup> Within twenty-four hours after the decision was published, both houses of Congress had passed resolutions reaffirming the Pledge.<sup>319</sup>

The *Newdow I* panel subsequently amended its original opinion in *Newdow II*, and the Ninth Circuit denied a rehearing *en banc* (*Newdow III*).<sup>320</sup> The dissenting opinions in *Newdow II* and *Newdow III* argue that the phrase “under God” in the Pledge is constitutional. The *Newdow III* opinion, dissenting from the denial of rehearing *en banc*, combined with that of Judge Fernandez in *Newdow II* provide instructive texts for analyzing the arguments made in support of the constitutionality of the Pledge, as amended. I will refer to these two opinions of the dissenting judges in *Newdow II* and *Newdow III* as those of the “judges” or “dissenting judges” in the following analysis.

The dissenting judges first identified the underlying important values by asserting that not only has “religious tolerance and diversity flourished in this country,” but that the United States may take pride in the fact that it has become a “beacon for other nations in this regard.”<sup>321</sup> “The Constitution is a practical and balanced charter”<sup>322</sup> and was written for the purpose of avoiding discrimination.<sup>323</sup> At root, the American constitutional system provides that “government will neither discriminate for nor discriminate against a religion or religions.”<sup>324</sup> The religion clauses of the Constitution “require . . . neutrality [and] those clauses are, in effect, an early kind of equal protection provision.”<sup>325</sup> Like the Stasi Commission, the dissenting judges use the great values of equality, neutrality, and tolerance as touchstones.

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317. *Id.* at S6111–12 (statement of Sen. Clinton).

318. 148 CONG. REC. H4030 (daily ed. June 26, 2002) (statement of Rep. Jeff Daniels).

319. *See supra* discussion accompanying notes 9–10.

320. For the *Newdow* decisions, see *supra* note 7.

321. *Newdow III*, 328 F.3d at 481 (9th Cir. 2003).

322. *Newdow II*, 328 F.3d at 492 (9th Cir. 2003).

323. *Id.* at 490.

324. *Id.* at 491.

325. *Id.*

The judges then show great deference to the sensibilities of those who wish to recite and support the Pledge. For such people, the declaration that the United States is “under God” inspires “a vestige of the awe all of us, including our children, must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country.”<sup>326</sup> In reciting the Pledge, many Americans will feel a “healthy glow.”<sup>327</sup> And if the words were stricken from the Pledge, it would “deprive[] children in public schools of the benefits derived from those expressions.”<sup>328</sup> In other words, the sentiments inspired by the theological language are of high importance and removing them would constitute a real deprivation to children. As for the concern of plaintiff Newdow, Judge Fernandez ridicules it by labeling it with the pejorative of “feel-good” sentiments.<sup>329</sup> In Judge Fernandez’s words, “although we do *feel good* when we contemplate the effects of [the Pledge’s] inspiring phrasing and majestic promises, it is not primarily [Newdow’s] *feel-good* prescription.”<sup>330</sup> Thus, remarkably, in a case involving conflicting claims on matters of religion and conscience, a federal judge apparently finds a constitutional distinction between something that should be protected because it makes us “feel good” and something that is merely “feel-good” and not worthy of protection.

The dissenting judges also cite approvingly the “public outcry across the nation” when the “God” language was struck.<sup>331</sup> Thus, the judges interpret the strong passions in favor of the Pledge as evidence confirming the correctness of their position. Although the *Newdow* case involved only references to God being struck from the Pledge, Judge Fernandez—with no citation to the record—distorts

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326. *Id.* at 493.

327. *Id.*

328. *Id.* at 490 n.1. The judges offer no evidence whatever that children have any such feelings or notions while they are reciting the Pledge. They similarly provide no evidence that children attending school before the term was inserted in 1954 had any less sense of the immenseness of the universe than did children educated after that time. Nor do they provide any evidence that the elimination of the words from the text would have any harmful effect. Indeed, *all of the arguments for the importance of the words “under God” apparently came from the judges’ personal beliefs, opinions, or notions.*

329. *Id.* at 492 (“We should not permit Newdow’s feel-good concept to change that balance.”). The interests that Newdow seeks to defend are further described as “minuscule,” “de minimis,” and “picayune at most.” *Id.* at 491.

330. *Id.* (emphases added).

331. *Newdow III*, 328 F.3d at 472.

Newdow's actual claim and then caricatures him as a mentally unbalanced person seeking to ban all religion from public life:

[S]uch phrases as ‘In God We Trust,’ or ‘under God’ have no tendency to establish a religion in this country or to suppress anyone’s exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.<sup>332</sup>

Although the *Newdow* case pertained only to official state declarations of theology, and said nothing about what free citizens should be able to say and think generally, Judge Fernandez caricatured the plaintiff's claim by wrongly suggesting that Newdow wished to drive all religion out of public life. Judge Fernandez then delivered an ad hominem attack against the emotional instability of people like Newdow who wish to “cool [their] febrile nerves . . . at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen.”<sup>333</sup> Unlike his fellow citizens, who admire their country for being a land of “religious tolerance,”<sup>334</sup> plaintiff Newdow is “fastidiously intolerant and self-indulgent.”<sup>335</sup> The judges see strong emotions in support of “God” language as positive vindication of the rightness of their position, while strong emotions on the other side are seen as evidence of mental instability and intolerance, and thus a reason why such arguments should be dismissed.

The dissenting judges believe that it is of constitutional significance to acknowledge that there have been many references to God in American documents, symbols, and institutions.<sup>336</sup> These include, according to the judges, references to God in the Constitution,<sup>337</sup> the Declaration of Independence, the Gettysburg

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332. *Newdow II*, 328 F.3d at 492.

333. *Id.* at 493.

334. *Newdow III*, 328 F.3d at 481.

335. *Id.*

336. *Newdow III*, 328 F.3d at 479 (“A theory of the Establishment Clause that would have the effect of driving out of our public life the multiple references to the Divine that run through our laws, our rituals, and our ceremonies is no theory at all.”).

337. The assertion that “the Constitution itself explicitly mentions God,” *id.* at 479, is highly misleading. The only arguable reference to God is in the Constitution’s *pro forma* expression “the Year of our Lord one thousand seven hundred and eighty seven,” which is a rather weak peg on which to hang a constitutional principle. This misleading suggestion is made in the same paragraph that begins by accusing the panel majority of having engaged in “the purest exercise in sophistry.” *Id.*

Address, the National Anthem, National Motto (“In God We Trust”), and the judicial invocation “God save these United States and this honorable Court,” as well as to the religious significance of the Thanksgiving and Christmas holidays.<sup>338</sup> They believe that these “expressions have not caused any real harm of that sort over the years since 1791, and are not likely to do so in the future.”<sup>339</sup> Just as the House and Senate Reports argued that “God” could be inserted based upon the precedents of the Mayflower Compact and other similar references to God in American history, the Ninth Circuit dissenting judges believed that history and traditions supported their interpretation.

As a logical matter, the dissenting judges are not advancing a *constitutional* argument when they identify the many cases where American traditions and laws incorporated religious language and symbols. One does not prove that an action is constitutional by citing the number of times it has occurred any more than one proves that murder should be legal by citing the number of times it is committed. The issue is not the frequency in which language and imagery refer to God, but its principled constitutionality. Even if this point is not initially seen with regard to religion, it can easily be understood with regard to racial discrimination. If a statute were challenged on the grounds of racial discrimination, surely, in the twenty-first century, we would repudiate any argument that defended a discriminatory statute on the grounds that the Constitution permitted slavery, that all of the founders were white, that the Congress that adopted the Fourteenth Amendment also enacted laws that discriminated, that many prior statutes were discriminatory, or that the legislators who voted for the Civil Rights Act of 1964 discriminated in their own hiring practices. The precedents of racial discrimination, whether they appear in the Declaration of Independence, the Constitution, or in the personal lives of the revered founders or latter-day legislators, do not provide compelling grounds for statutory discrimination today.<sup>340</sup> With

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338. *Id.* Judge Fernandez identifies other examples of patriotic songs and expressions. *Newdow II*, 328 F.3d at 492–93.

339. *Id.* at 492.

340. While we can understand today the error of arguing for racial discrimination on the basis of American traditions, there was a time when this was not so obvious. We can now see the notorious mistake in the *Dred Scott* decision when it concluded that blacks should not be included within the phrase “all men are created equal” *because* the founders held slaves. *Scott v. Sandford*, 60 U.S. 393 (1856).

regard to race, it is now obvious that justifying a statute on the basis of discriminatory traditions would be a *repudiation of the principles of equality and neutrality and not an application of them.*

Moreover, the dissenters' use of examples from the past is not serious history; it is a sentimental voyage that exposes a fundamental misunderstanding of what traditions mean. These traditions are actually selected memories and symbols that were adopted, resurrected, and sometimes even invented.<sup>341</sup> When the dissenters wish to invoke the founders, they cite the "God" language in the Declaration of Independence but quickly pass over the fact that the Constitution, the law of the land, contains no equivalent provisions. When they want "God" in a motto, they will ignore the founders' motto, "E Pluribus Unum" (out of many, one), in favor of one that was coined (literally) on a two-cent piece in the midst of the Civil War and that was codified only in the 1950s. They evoke the Puritans when they like their references to religious beliefs, but they ignore the Puritans when the consequences of those beliefs are offensive. And they certainly ignore the fact that the Puritans, like the Jehovah's Witnesses, would have found it repugnant to pledge allegiance to a flag.

Although the dissenting judges were quite willing to attack the mental balance of those who oppose the "God" language in the Pledge, they did not respond to the core argument of the majority:

A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion.<sup>342</sup>

Of course the declaration that the United States is a "Nation under God" is a theological statement—and the dissenting judges fully

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But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted.

*Id.* at 410. The Court thought it was more logical to believe that blacks should not be treated as men who were created equal than to think that actions of the founders were inconsistent or unprincipled.

341. See THE INVENTION OF TRADITION 1–14, 263, 270–73, 279–80, 292–93 (Eric Hobsbawm & Terence Ranger eds., 1992).

342. *Newdow II*, 328 F.3d at 487 (majority opinion).

acknowledge that it is at least “*an undoubtedly religious reference.*”<sup>343</sup> Although the term is religious, they assert, it nevertheless is neutral. Presumably the judges who make such a finding would have no difficulty recognizing that it would not be a neutral act to substitute the Arabic word for God, “Allah,” in the Pledge. Even though Allah refers to the same Abrahamic God mentioned in the Pledge, it is difficult to imagine that Americans would think that a pledge of allegiance to a “Nation under Allah” would be neutral—any more than the insertion of Zeus or Vishnu would be neutral.<sup>344</sup> And yet the judges argue that removing this term “confers a favored status on atheism”<sup>345</sup> and “affirmatively favors” nonbelief.<sup>346</sup> Thus, we are left with the very clear realization that the dissenting judges, like the Stasi Commission, are defending state policies not because they are in fact *constitutionally neutral*, but because they are *conventionally acceptable*.

## VI. CONCLUSION

To be fair to both France and the United States, it should be recognized that each has made an important contribution to promoting freedom of conscience. One of the principal values of *laïcité* is the official respect it provides for beliefs that are not religious and for recognizing the human dignity of the many people who do not find strength or value in religion. Whether nonbelievers are scientists, philosophers, doctors, political leaders, or day laborers, they are officially respected by a *laïc* state for their profound contributions to society, and they are valued as people who are fully

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343. *Newdow III*, 328 F.3d 466, 478 (9th Cir. 2003) (emphasis added). Using a very sharp scalpel indeed, the judges acknowledge that although “under God” is “an undoubtedly religious reference,” nevertheless having children place their hands over their hearts and repeating those words is *not* a “religious act.” *Id.* at 478. This fine distinction reminds us of the difference between the constitutionally protected references that make us “feel good” and those that are unprotected because they are *merely* “feel-good.” See *supra* text accompanying notes 329–30.

344. Despite the judges’ polemical and extreme characterizations of the motives of the plaintiff, *Newdow never requested that his theological opinions be substituted*. He requested *only* that theological beliefs not be decided by legislative majorities—an opinion most Americans would presumably hold if their legislature were making theological judgments that they did not share.

345. *Newdow III*, 328 F.3d at 481.

346. *Id.* at 482.

entitled to participate in the political world, public discourse, and debates about values, morality, and ethics.

With respect to the United States, there has emerged—albeit more recently than the myth suggests—a very healthy presumption that people of widely divergent religious beliefs should be protected by the state and that respecting religious freedom positively aids the health and strength of the state. Such policies and attitudes are not only fully consistent with international human rights standards that protect freedom of religion, they are also deeply respectful of human dignity and the freedom of individuals to devote themselves to religion. While some parts of the world are becoming increasingly rational and skeptical, and while other parts of the world seem to be increasingly religious, it is no small accomplishment for the United States to be in the vanguard of generating scientific discovery and of defending freedom of religion.

Both France and the United States have reason to take pride in these positive accomplishments. But there are also serious weaknesses in each country that appear when they fail to adhere to their professed beliefs in equality, neutrality, and tolerance, and apply instead their mythic versions of *laïcité* and religious freedom to discriminate against others. The historical myths of *laïcité* and religious freedom are inspiring largely because they have been sanitized of the violence, intolerance, cruelty, and discrimination that have been conducted historically in their names. *Laïcité* and religious freedom did not emerge in the two countries as a consequence of historical experiences of unity in a common cause, as is often incorrectly imagined, but as ideologies that were often used to drive wedges between people. The histories of the two countries are replete with examples where *laïcité* and religious freedom were used respectively to challenge the patriotism of citizens, and where verbal and physical abuse were employed when loyalty was found lacking. While these founding myths of *laïcité* and religious freedom differ in content, they serve a remarkably similar function in the two countries of constructing or imagining sentimental, but misleading, images of national unity and common beliefs.

In the United States, the rhetoric of God, the flag, patriotism, and religion has repeatedly been used to attack people of conscience. We need look no further than at the photographs of hooded members of the Ku Klux Klan proudly parading under the American flag down Pennsylvania Avenue in Washington, D.C., at the same

time that Jehovah's Witnesses were being beaten, expelled from schoolrooms, and assaulted in the press because they believed that pledging allegiance to a flag was paying homage to a false idol. Ironically, the seventeenth-century Puritans, whose legacy is frequently invoked as evidence of a religious founding of America, shared the sentiments about false idols of those who refused to pledge allegiance to a flag.

In France, in the name of protecting Muslim girls against coercion, the state has decided to force them either to remove headscarves or to forgo a public education. The solicitude for young people, which the Stasi Commission appropriately felt for those who are forced to wear headscarves against their will, vanished when it came to threats, coercion, or violence against those who wish to wear head coverings. Such solicitude cannot be defended as a neutral interpretation of doctrines of equality, tolerance, and separation of religion and state; rather, it can be defended only as a part of a mythic version of *laïcité* that seeks to suppress sincere religious conviction that differs from the preferred views of the society.

The Stasi Commission and the dissenting judges in *Newdow* reached conclusions regarding matters of conscience and constitutions that were fully consistent with the popular majorities and political powers in their respective countries, which also conformed to the conventional national symbols, images, rhetoric, and beliefs about unity and identity. We can imagine that the American judges would have had no difficulty seeing the lack of neutrality in the Stasi Commission's solicitude for the feelings of those who do not wish to wear the headscarf and obliviousness to the consciences of those who do. We also can imagine that the members of the Stasi Commission could easily see that the expression "one Nation under God" is no more neutral than is the expression "one Nation without a God" or "one Nation under Allah." Both countries, as well as the eminent scholars and jurists of the Stasi Commission and the Ninth Circuit, have tended to disparage those who do not want governments to decide what students should say or not say about God and what they should or should not wear to honor their God. In both France and the United States, those who had beliefs differing from the national consensus were either ignored or ridiculed.

Perhaps one day French political leaders who, in the name of neutrality and tolerance, wish to prohibit schoolchildren from

honoring their God by wearing head coverings might instead understand the deepest meaning of the prayer offered by the secular, anticlerical, godfather of tolerance and *laïcité*, Voltaire. In his *Treatise on Tolerance*, the great skeptic himself—the person whose life and teachings were most honored during the first Revolution—offered his own prayer to God:

Make us help each other bear the burden of our difficult and transient lives. May the small differences between the clothes that cover our weak bodies, between all our inadequate languages, all our petty customs, all our imperfect laws, all our foolish opinions, between all of the circumstances that seem so enormous in our eyes but so equal in Thine—may all these small nuances that distinguish the atoms we call men not serve as a basis for hatred and persecution. May those who light candles at noon to celebrate Thee also sustain those who are fully satisfied with the light of Thy sun. May those who show their love for Thee by wearing white cloth not detest those who express their love for Thee by wearing black wool.<sup>347</sup>

In the United States, perhaps one day the legislators who showed their stalwart support for the Pledge of Allegiance by having their photographs taken while reciting it on the steps of the Capitol Building might, in their hearts, understand the deepest significance of the words:

When you pray, you must not be like the hypocrites; for they love to stand and pray in the synagogues and at the street corners, that they may be seen by men. Truly I say to you, they have received their reward. But when you pray, go into your room and shut the door and pray to your Father who is in secret; and your Father who sees in secret will reward you.

And in praying do not heap up empty phrases as the Gentiles do; for they think that they will be heard for their many words. Do not be like them.<sup>348</sup>

Unfortunately, proponents of French *laïcité* and American religiosity wrap themselves in their flags and mythic identities while forgetting that the essence of their teachers' deepest principles—genuine tolerance and personal piety—are greater than formulaic

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347. VOLTAIRE, TRAITE SUR LA TOLERANCE ch. XXIII (1766).

348. Matthew 6:5–7.

public utterances of belief. Possibly the French and the Americans should recognize that, despite their obvious differences, they resemble each other in some uncomfortably revealing ways. Perhaps it is in Scotland—where favorable feelings toward both France and America have long prevailed—that both might find merit in the words of its greatest poet: what a gift it would be to see ourselves as others see us.<sup>349</sup>

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349. “O wad some Power the giftie gie us / To see ousrels as ithersee us!” Robert Burns, *To a Louse: On Seeing One on a Lady’s Bonnet at Church*, in THE COMPLETE WORKS OF ROBERT BURNS 181, 182 (James A. MacKay ed., 1986).